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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1196

RALPH E. COREY and
ROBERT M. KIMBROUGH, Petitioners

v.

STATE SAVINGS & LOAN ASSOCIATION,
WALLACE C.S. YOUNG, and BETTER
BUILT HAWAII, LTD., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII; APPENDICES A, B, C, D, and E

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IN THE SUPREME COURT
OF THE UNITED STATES

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RALPH E. COREY and ROBERT M. KIMBROUGH, Petitioners,	)	
vs:	)	No. 71-____
STATE SAVINGS & LOAN ASSOCIATION, WALLACE C. S. YOUNG, and BETTER-BUILT HAWAII, LTD.; Respondents.	)	

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF HAWAII

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Hawaii, hereinafter called the "appellate court," entered in the above-entitled case on October 22, 1971.

CITATIONS TO OPINIONS BELOW

The Opinion of the appellate court, printed in Appendix B, infra, is reported in 53 Haw. 132. The appellate court's per curiam denying the petition for rehearing, printed in Appendix D, infra, is reported in 53 Haw. 177.

JURISDICTION

Rule 10 of the Rules of the Supreme Court of Hawaii, which is set forth in Appendix A, infra, provides for the entry of final judgment within 10 days of the filing of the opinion disposing of the cause, or, if a petition for rehearing is filed, for the entry of the judgment after the disposition of such petition.

In this cause, the Opinion of the appellate court was filed on September 9, 1971 (Appendix B, infra).

By order of the appellate court, counsel for petitioners was given an extension of time until

September 30, 1971, to file a petition for rehearing. Petition for Rehearing filed on September 30, 1971 (Appendix C, infra), was denied per curiam on October 5, 1971 (Appendix D, infra). Judgment on Appeal was filed and entered October 22, 1971, at 8:00 o'clock A. M. (Appendix E, infra).

This Court has held that the date of the opinion of a state court is not controlling; that the time shall run from the entry of the judgment or decree. Puget Sound Power & Light Co. v. King County, 264 U.S. 22, 24, 25.

Motion for Extension of Time to File Petition for Writ of Certiorari was received by the Office of the Clerk of this Court on January 10, 1972. An Order Extending Time to File Petition for Writ of Certiorari (A-733), extending the time to and including March 20, 1972, "without prejudice to the court's consideration as to

whether this application has been filed in time, was granted by Justice W. O. Douglas on January 19, 1972

The jurisdiction of this Court is invoked under Title 28, Section 1257(3). United States Code, with respect to title, rights, privileges, and immunities set up and claimed under the Constitution of the United States.

QUESTIONS PRESENTED

I.

Does a judgment of a state court of last resort violate the Fourteenth Amendment to the Constitution of the United States:

Where a written undertaking by its terms obligates sureties to provide such funds to construct proposed improvements as might be necessary in addition to mortgage funds borrowed by a corporate mortgagor;

Where the corporate mortgagor pays the

contractor from the mortgage loan proceeds the agreed contract price to construct the said improvements;

Where the contractor fails to pay subcontractors whose mechanics liens rank prior to the mortgage lien;

Where the subject premises are sold at foreclosure sale and the subcontractors' mechanics liens are discharged from the proceeds of the sale; and

Where the said judgment, on the basis of a conjectural conclusion, reverses the trial court and holds the sureties on the written undertaking liable to reimburse the purchaser of the premises for that portion of its purchase price which discharged said mechanics liens?

II.

Does a state court of last resort violate the Fourteenth Amendment to the Constitution of the

United States:

Where the decision of said court is in conflict with and in derogation of the applicable law upon which appellants relied in the trial court and on appeal;

Where said applicable law is applied unequally between the parties to the suit and between appellants and others in like circumstances in reported cases;

Where appellants on a petition for rehearing are denied an opportunity to present their case and be heard in the light of the conjectures and unprecedented conclusions employed to arrive at the subject decision; and

Whereby the appellants are held liable to the mortgagee on a written undertaking and in tort for the amount of a deficiency in a prior foreclosure action in which the appellants were party-defendants:

(a) Notwithstanding the fact that the appellants had not personally endorsed the mortgage note;

(b) Notwithstanding the fact that the mortgagee had waived the deficiency in the prior action;

(c) Notwithstanding the total lack of proof that the subject foreclosure and/or deficiency were proximately caused by the acts complained of; and

(d) Notwithstanding the proof offered that the fair and reasonable market value of the premises exceeds the aggregate amount of the deficiency and the price paid by the mortgagee for the premises at the foreclosure sale?

III.

Does a state court of last resort violate the Fourteenth Amendment to the Constitution of the United States:

Where a case involves the civil liability of corporate officers for the amount of damages alleged to have been suffered by a mortgagee because of the default of their principal on a mortgage note;

Where one of said officers is an attorney at law;

Where the decision of said court goes beyond the scope of the issues briefed and argued on appeal and censures said attorney for professional impropriety without notice or an opportunity to be heard in accordance with pertinent rules and law; and

Where the court also denies said attorney's petition to be heard in his defense against the charge?

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

The constitutional provision involved is the

Fourteenth Amendment to the Constitution of the United States. The statutes involved are § 1-1, § 1-6, § 602-13, and § 605-9, Hawaii Revised Statutes. The rules involved are Rule 5, Rule 10 and Rule 16 of the Rules of the Supreme Court of the State of Hawaii.

The constitutional provision, statutes, and rules involved are printed in Appendix A, infra.

STATEMENT OF THE CASE

General History

This cause originated on May 13, 1965, when State Savings & Loan Association, hereinafter called the "mortgagee," commenced a mortgage foreclosure suit (Civil No. 636) in the Circuit Court of the Fifth Circuit, State of Hawaii, hereinafter called the "Kauai court." Named as defendants are Kauaian Development Company, Inc., hereinafter called the "mortgagor," Better-Built Hawaii, Ltd., Blue Sea, Inc., Robert M.

Kimbrough, Ralph E. Corey, Wallace C. S. Young, 76 other named individuals, and John Doe and Mary Doe 1 to 100.

The complaint in Civil No. 636 alleges default on a promissory note for $857,000, signed by the mortgagor for a construction loan secured by a mortgage on real property located on the Island of Kauai, upon which the mortgagor did construct a condominium, hereinafter referred to as the "Seven Seas Hotel." The complaint also alleges that the mortgagor had not fully paid Better-Built Hawaii, Ltd., hereinafter called the "contractor," for the construction of the buildings on the premises. The complaint further alleges that the claim of other defendants to interests in the real property as owners of condominium units in the Seven Seas Hotel is without legal foundation.

Defendants Kimbrough, Corey and Young

had been president, vice-president, and secretary-treasurer, respectively, of the mortgagor when the note and mortgage was executed. They did not individually endorse the note. Defendant Corey was also the mortgagor's counsel.

In the course of trial of the Kauai case, the mortgagee introduced into evidence an undertaking signed by Defendants Kimbrough, Corey and Young, which personally guaranteed any moneys in addition to the mortgage loan which might be necessary to complete the Seven Seas Hotel as originally planned at the time of the loan.

The record in Civil No. 636 further shows that 46 days before the mortgagee filed an amended complaint in that case, its attorney was served with papers which clearly indicate that the actual building contract between the mortgagor

and the contractor for construction of the Seven Seas Hotel as originally planned was for $660,000. Copies of this working contract were receipted for by counsel for the mortgagee on October 11, 1965.

On November 15, 1965, counsel for the mortgagee served a letter notice on Defendants Kimbrough, Corey and Young, demanding payment under the aforesaid personal undertaking, of sums alleged to be due subcontractor defendants who had been joined in the foreclosure suit. The letter threatened suit if the demand were not met. Said individual defendants did not make the payments demanded.

The trial in the Kauai court commenced on January 16, 1966. Exhibits were introduced into evidence showing the mortgagor's balance sheet at the time of the mortgage loan, the loan settlement statement, the undertaking signed by

Defendants Kimbrough, Corey and Young, personally, and copies of the working contracts between the contractor and mortgagor.

Frequent exchanges between counsel resulted in a ruling by the Kauai court that there is no distinction between in rem and in personam jurisdiction, and that the court had in personam jurisdiction over all parties who had appeared.

The proof adduced showed that many condominium purhcasers had contracted to purchase units in the Seven Seas Hotel and had made substantial down payments before the mortgage was executed.

The Kauai court rendered its decision, holding that a condominium-horizontal regime had not been established, that the unit purchasers had no interest in the Seven Seas Hotel, and that the mortgage lien was junior only to prior liens of the unpaid subcontractor defendants. - The

property was ordered sold.

The mortgagee, the only bidder, purchased the property for $913,000 at the foreclosure sale. The subcontractors' prior liens aggregating $28,506.70 were paid by the mortgagor from proceeds of sale. On September 13, 1966, at a hearing to confirm the sale, all the costs of sale were settled by the court. A "deficiency" in the amount of $138,398.97 was waived by the mortgagee.

The deficiency was computed as follows:

Loan principal	$ 856,449.00
Accured interest on same	84,099.88
"Loan expenses"	81,358.48
Interest on same	984.91
Mechanic's liens	28,506.70
Receiver's salary	4,500.00
Commissioner's fee	15,500.00
Total:	$1,051,398.97
Purchase price	913,000.00
"Deficiency":	$ 138,398.97

The evidence indicated that the deficiency is comprised primarily of $119,364.79 loan dis-

count (included within principal) and accrued interest due the mortgagee, plus $18,200.00 advanced to the receiver pending the foreclosure suit. The mortgagee, as sole bidder, elected not to pay itself cash already advanced and interest income.

Thereafter, on September 15, 1966 (thirteen [13] days prior to the entry in the Kauai court of the order confirming sale of the premises to the mortgagee), the mortgagee commenced a second suit, Civil No. 19985 in the Circuit Court of the First Circuit, State of Hawaii, hereinafter referred to as the "Honolulu court," against Ralph E. Corey, Robert M. Kimbrough and Wallace C. S. Young as defendants.

The first count in Civil No. 19985, alleges that there "is due and owing" to the mortgagee from the defendants, under their personal undertaking, the amount of the two mechanics liens

($28,506.70) which, as shown above, had been paid to the subcontractors out of the proceeds of the foreclosure sale of the mortgagor's property.

The second count in Civil No. 19985, alleges that the defendants are liable to the mortgagee for the waived deficiency in the foreclosure suit ($138,398.97) "less such sums awarded under Count I of this complaint," on the ground that defendants had falsely represented to the mortgagor the actual amount of the construction contract between the mortgagor and the contractor.

After the order confirming foreclosure sale had been entered in the Kauai court, defendants timely moved in the Honolulu court to dismiss Civil No. 19985 on the ground of res judicata. The motion was denied.

The foreclosure judgment in Civil No. 636 was appealed from the Kauai court to the appellate court. The latter reversed the Kauai court's

decision as to the establishment of a horizontal regime in the Seven Seas Hotel and remanded the case to determine the status of the condominium owners vis-a-vis the mortgagee (50 Haw. 540).

Civil No. 19885 went to trial in the Honolulu court on September 30, 1969, after the mortgagee had resold the Seven Seas Hotel for $1,350,000 and accepted a new mortgage for more than $1,000,000. During the trial, Defendants Corey and Kimbrough made an offer of proof that the fair and reasonable market value of the premises, as completed by the mortgagor, far exceeded the purchase price paid by the mortgagee at the foreclosure sale, and was at least equal to the pre-construction appraised value upon which the mortgage loan had been based.

The only proof of value which the Honolulu court allowed to go to the jury (over objection) was the Order Confirming Sale in the Kauai

foreclosure case, indicating the "deficiency" of $138,398.97. The Honolulu court's ruling was based on the mortgagee's theory that said order in Civil No. 636 was res judicata as to damages. During the trial, Defendants Corey and Kimbrough had timely moved for a directed verdict on the ground that Civil No. 636 was res judicata as to the whole of Civil No. 19985, relying on Ellis v. Crockett, 51 Haw. 45 (February, 1969); and In Re Bishop Estate, 36 Haw. 403, 416 (1943) as cited in Ellis, and which in turn is bottomed on Southern Pacific R. Co. v. U.S., 168 U.S. 1.

The jury returned a verdict for the mortgagee and against all defendants on Count I for the amount paid by the mortgagor to subcontractor defendants in the Kauai case ($28,506.70) and against Defendants Corey and Kimbrough on Count II for the balance of the $138,398.97 waived deficiency in the Kauai foreclosure action.

In post-trial motions, defendants convinced the Honolulu court in Civil No. 19985: (1) of its error in submitting the construction of the personal undertaking to the jury; and (2) that the defendants owed nothing on Count I because: (a) the Seven Seas Hotel had been completed, including extras over and above the original plans and specifications; (b) the contractor had been paid in full by the mortgagor for the work according to the original plans and specifications; and (c) subcontractors whom the contractor had failed to pay were paid by the mortgagor from the proceeds of foreclosure sale. The court also recognized its error in refusing to allow the defendants to introduce evidence of the fair and reasonable market value of the security for the mortgage loan. Accordingly, the Honolulu court entered an order giving defendants judgment notwithstanding the verdict on Count I and ordered a new trial as

to damages on Count II.

All parties appealed to the appellate court. In light of the posture of the case at the time of taking the appeal, Defendants Corey and Kimbrough's primary assignment of error on appeal was:

> "1. Where the parties had previously litigated an action based on the same facts, and had a reasonable opportunity to litigate the issues presented in the second suit, is the second suit barred by the principle of res judicata?"
>
> Questions Presented for Decision, Opening Brief of Petitioners, p. 2, (filed in No. 5021, Supreme Court of the State of Hawaii, December 8, 1970).

The Opinion of the Appellate Court In Relation to Question I, Supra

The Opinion (Appendix B) states without equivocation that "The jury...rendered a verdict of $28,506.70, the amount of the mechanics' liens, on Count I under the written guarantee agreement against Defendants Kimbrough, Corey

and Young." The Opinion also acknowledges that the personal undertaking by the petitioners was "to provide all funds in excess of the mortgage loan necessary 'to complete this project as originally proposed in the mortgaging agreements'."

The record shows that the contractor had been paid in full by the mortgagor for all of the work on the hotel as originally planned at the time of the mortgage loan. The record shows that judgment was entered for these same subcontractors against the contractor in the Kauai case. Yet, the appellate court based petitioners' liability to the mortgagee on the following conjecture: "Had the contractor received the full $761,500.00 as was represented to State Savings, it is reasonable to assume that the mechanics' liens would have been paid."

This conjecture of the appellate court

implicitly holds: (a) the mortgagor should have paid the contractor $101,500 more than the price agreed between said parties; and (b) because it did not, the sureties are liable to the mortgagee on their written undertaking for the amount the mortgagor paid to the subcontractors to discharge mechanics liens.

Substitution of this unfounded conjecture for the written contracts of the parties injected a federal question into the case, raised by petitioners in their Petition for Rehearing (Appendix C, infra):

"I.

"The Court's Opinion Exceeds the Authority of the Court Inasmuch as by State Action it Impairs the Obligation of Contracts in Violation of Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States." (Citing Ellis v. Crockett, 51 Haw. 45, 54; Burbank v. Wood, 2 Haw. 591, 598, 604-5; City of Chicago v. Sheldon, 76 U.S. 50, pp. 55-56, 9 Wall. 50, 19 L.Ed. 177; Havemeyer v. Iowa County, 70 U.S. 294, 18 L. Ed. 38; State of Louisiana ex rel

Southern Bank v. Pilsbury, 105 U.S. 278, 26 L. Ed. 1090; and Union Bank of Richmond Va. v. Board of Com'rs. of Oxford N.C., 90 F. 7).

This federal question was decided per curiam by the appellate court, without opinion, in denying the Petition for Rehearing (53 Haw. 177, Appendix C).

The Opinion of the Appellate Court In Relation to Question II, Supra

The petitioners here were cross-appellees before the appellate court on the construction of the personal undertaking, the Honolulu court, as noted, having granted their motion for a directed verdict on Count I. At that point of time, the law of Hawaii was that the construction and legal effect of a contract is a question of law to be decided by the court. Reed and Martin, Inc. v. City and County, 50 Haw. 347 (1968), citing Mackenzie v. King, 30 Haw. 230 (1957).

In its Opinion, without considering the above

rule, the appellate court stated that in construing the contract, the "trial court substituted its judgment for the jury's," and reversed and reinstated the jury's verdict.

When the petitioners took their appeal, the settled law of Hawaii required that in actions for money damages based on deceit, the plaintiff must show by substantial evidence that the events complained of were the sole variant causing the financial loss which was suffered. Rainbow Island Productions Inc. v. Leong Agency, 44 Haw. 134; and Ellis v. Crockett, 51 Haw. 45, citing with approval Toho Bussan Karsha Ltd. v. American President Lines, Ltd., 265 F.2d 418). The absence of causal connection is completely ignored by the appellate court.

The Opinion does admit that "here we have a mortgagee who was defrauded not as to the value of the property...".

In the Opinion, the appellate court announces its refusal to be bound by any one rule for determining damages in the case of fraud. It states that it will use a "flexible rule... which would apply a different theory depending on the equities and proof available in each case."

Petitioners also depended upon the appellate court applying to the case at bar that portion of Ellis v. Crockett, supra, at 54, wherein it is held:

> "...As to Crockett, who it is admitted by the plaintiffs in their complaint was acting as agent for the Haradas throughout all of the transactions in this case, we hold he could not be sued independently if a suit against his principal is now barred..."

This principle of law was ignored by the appellate court.

The Opinion of the appellate court acknowledges that Ellis v. Crockett, supra, and In Re Bishop Estate, 36 Haw. 403, 416, correctly

state the doctrine of res judicata as applied in Hawaii. The Opinion also acknowledges that the case before it is "the result of a suit initiated... for a mortgage loan made by State Savings in favor of Kauaian Development Co., Inc."

The Opinion further acknowledges that the petitioners had argued that the Honolulu court in Civil No. 19985 erred "in failing to dismiss the complaint and in failing to direct a verdict" on the issue of res judicata and that they "further rely heavily on this court's decision" in Ellis v. Crockett, supra. The Opinion fails to note that petitioners relied on Ellis v. Crockett not only on appeal, but also during trial and in post-trial motions.

The Opinion in this cause goes on to note that counsel for the mortgagee, as well as counsel for petitioners, misunderstood and misconstrued "our decision in Ellis."

The Opinion further states: "... defendants' defense of res judicata must fall. We need not reach the question whether the parties and subject matter in the present case are the same as those in the prior mortgage foreclosure action. The fact that plaintiff's damages were not known at the time of the foreclosure action is determinative of the res judicata issue." (Emphasis supplied.)

These actions by the appellate court for the first time injected a second federal question into the case, raised by the petitioners in their Petition for Rehearing (Appendix C):

"II.

"The Court's Opinion is in Conflict with and in Derogation of Both the Common Law and the Decisional Law of Hawaii. The Opinion, Therefore, Abridges Appellants' Privileges and Immunities and Denies Them Due Process of Law and the Equal Protection of the Law as Set Forth in the Fourteenth Amendment of the United States Constitution.

"A. The Opinion and the Law of Contracts as it Previously Existed in this Jurisdiction." (Citing Reed & Martin, Inc. v. City and County, 50 Haw. 437; Mackenzie v. King, 30 Haw. 230.)

"B. The Opinion and the Law Relating to Fraud as it Previously Existed in this Jurisdiction." (Citing Rainbow Island Productions, Inc. v. Leong Agency, 44 Haw. 134; Ellis v. Crockett, 51 Haw. 45, 52.)

"C. The Opinion and the Law Relating to Agency." (Citing Ellis v. Crockett, supra, at 54.)

"D. The Opinion and the Law Relating to Res Judicata." (Citing In Re Bishop Estate, 36 Haw. 403, 416; Ellis v. Crockett, supra, at 53.)

"E. The Effect of the Opinion Upon Appellants' Constitutional Rights Under the Fourteenth Amendment to the Constitution of the United States." (Citing Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 677-678, 680-681; Owenby v. Morgan, 256 U.S. 94, 111; Frank v. Mangrum, 237 U.S. 309, 326; Republic Pictures Corp. v. Kappler, 151 F.2d 543, 162 A.L.R. 228, affirmed 66 S.Ct. 523, 327 U.S. 757, 90 L.Ed. 991; Hosey v. Club Van Cortland, 299 F. Supp. 501; Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161; Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031, 97 L. Ed. 1586; New York Times v. Sullivan,

376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d. 686.)

The federal question thus raised was decided in the appellate court without opinion, per curiam, in denying the Petition for Rehearing (53 Haw. 177, Appendix C).

The Opinion in Relation to Question III, Supra

Although the issue had never been submitted to the appellate court, and although no notice was given to Petitioner Corey, Part VIII of the Opinion, under the heading, "Attorney Corey's Conduct," states:

> "...We feel it pertinent to specifically admonish the perpetrators of such conduct. In many instances a fraudulent act will overshadow contemporaneous acts that would, taken alone, have been considered legitimate activity. In particular, this court questions the status of Defendant Corey in this case... an attorney, as an officer of the court, owes a special duty to the public, his client and the bar to keep his conduct beyond reproach, whether it be in or outside the scope of his status as an attorney. A lawyer should avoid even the appearance of professional

impropriety. Code of Professional Responsibility, Canon 9. The conduct of attorney Corey in this case raises serious questions of impropriety."

It was this action by the appellate court which for the first time injected a third federal question into the case. In the Petition for Rehearing, the question was presented to the appellate court as follows:

"III.

"The Court's Opinion, in Part VIII Thereof, Exceeds Its Jurisdiction, Goes Beyond the Scope of the Issues Submitted to it for Decision, and Violates Rule 16 of the Supreme Court and the Fourteenth Amendment to the Constitution of the United States." (Citing Rule 16 of the Rules of the Hawaii Supreme Court and In Re Trask, 46 Haw. 404.)

The appellate court decided this federal question without opinion, per curiam, in denying the Petition for Rehearing (53 Haw. 177, Appendix C).

REASONS FOR GRANTING THE WRIT

"No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Mathews, speaking for this court, in Yick Wo v. Hopkins, 118 U.S. 356, 369. 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal...' While such declarations of principle may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of government." Gulf, Colorado & Santa Fe Railway Co. v. Ellis, 165 U.S. 150, 159. (Emphasis supplied.)

It is respectfully submitted that the very

foundation of American government in Hawaii is being destroyed by the personal and arbitrary exercise of power by the appellate court. The case at bar is merely illustrative. The vacillating law of Hawaii is applied capriciously and unequally against the disfavored.

Disregard of precedent has been the subject of frequent dissent among the members of the appellate court itself for at least six (6) years. See for example, dissents in Agata v. Kahului Dev. Co., 49 Haw. 378, 392-402 (1966); Iwamoto v. Hirata, 49 Haw. 514, 516-17 (1966); Re Land Title, State of Hawaii, 49 Haw. 537, 554-558 (1967); Young v. Price, 50 Haw. 430, 440-451 (1968); Almeida v. Correa, 51 Haw. 594, 606-608 (1970); In Re Estate of Chun O. Y. Hop, 52 Haw. 40, 48-50 (1970); In Re Female Minor Child, 52 Haw. 395, 403-409 (1970); Matsumoto v. Kaku, 52 Haw. 629, 634-637 (1971).

Without appellate guidance by this court, which has been absent in civil litigation since statehood in 1959, the five-judge appellate court of the youngest state of the Union regroups its majority, from time to time, to accomplish arbitrary results (dissent, City Council v. Fasi, 52 Haw. 3, 10-26 [1970]; dissent Nishi v. Hartwell, 52 Haw. 188, 201-211 [1970]) and to render decisions which members of the court itself contend are in disregard of fundamental rights safeguarded by the United States Constitution (dissent, Akizaki v. Fong, 51 Haw. 354, 361-366 [1969]; dissent, Hawaii Nat'l. Bank v. Okino, 51 Haw. 367, 370-374 [1969]).

Reasonable adherence by a state appellate court to stare decisis is a fundamental privilege of petitioners which is protected from abridgment by the Fourteenth Amendment to the United States Constitution. In order to upset stare

decisis in an appellate court governed by basic tenets of Anglo-American justice, a litigant has the burden of showing that a change in the law will cause no loss of pre-existing rights or work no demonstrable entrapment on adverse parties and others who have relied on previous determinations of the questions before the court. 1 B Moore's Fed. Prac., sec. 0.402, pp. 51 et seq., particularly sec. 0.402(3-1), pp. 151-157. This fundamental privilege is abridged a fortiori by disregard of precedent by an appellate court sua sponte.

In Barber v. Connolly, 113 U.S. 27, 31, this Court held:

> "The Fourteenth Amendment . . . undoubtedly intended . . . that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; . . . that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts;

. . . that no greater burden should be laid upon one than are laid upon others in the same calling and condition . . ." (Emphasis supplied.)

As the statement of the case at bar clearly indicates, the appellate court disregarded the foregoing basic tenets of justice in determining the rights of petitioners. The decision abridges privileges and immunities and denies due process and equal protection of the laws guaranteed to petitioners by the Fourteenth Amendment to the United States Constitution. Statutes, rules and decisional law favoring petitioners has been disregarded; the same principles of law have been applied perversely in favor of the mortgagee and against petitioners; conjectural conclusion has been substituted for the written contracts of the parties.

One instance, among many, of capricious and discriminatory application of the law in the

case at bar relates to the doctrine of estoppel by judgment. This Court's classic rule of res judicata enunciated in Southern Pacific Railway Co. v. United States, 168 U.S. 1, 48-49, has been adopted as the law of Hawaii and repeatedly applied in prior decisions of the appellate court. See Makainai v. Lalakea, 29 Haw. 482, 488; Bertelemann v. Lucas, 35 Haw. 335, 341; Estate of Bernice P. Bishop, 36 Haw. 403, 417; and Glover v. L.K. Fong, 42 Haw. 560, 573.

This fundamental doctrine is in essence an immunity from relitigation which is protected from abridgment by a state court and which must be applied equally by a state court to all litigants in accordance with the guarantee of the Fourteenth Amendment to the United States Constitution.

The judgment in the Kauai foreclosure case is held by the appellate court not to bar the pro-

secution of the Honolulu suit, because the mortgagee could not determine the amount of its damages in the Kauai case. Yet, the deficiency waived in the Kauai case is held to be res judicata in the Honolulu case with the following incredible results: (a) the amount of deficiency waived by the mortgagee in the Kauai case is presumed, without proof, to be the irrefutable amount of the mortgagee's damages; and (b) the petitioners are prohibited from proving the fair and reasonable market value of the property purchased at the foreclosure sale by the mortgagee for $913,000, although it had been resold by the time of the Honolulu trial for $1,350,000. That is, the petitioners were prohibited from proving that the mortgagee suffered no damages.

In essence, according to the appellate court, a mortgagee who has been misled as to the cost, not the value, of improvements, is entitled to

receive more than payment in full under its contracts. This is directly contrary to the fundamental principles of law discussed by this Court in Gelfert v. National City Bank, 313 U.S., 221, 223.

By accepting the judgment of the Kauai case as irrefutable proof of damages, and by holding at the same time that said damages could not be determined in the Kauai case, the opinion of the appellate court is self-contradictory and also contradicts the prior opinion in Ellis v. Crockett, 51 Haw. 45. There, the same court holds that counterclaims for deceit related to mortgage transactions must be joined in the foreclosure suit because pecuniary damages are capable of being ascertained by calculation in the foreclosure action. Petitioners were thus denied equal protection of the laws accorded defendants in the Ellis case, guaranteed by the Fourteenth

Amendment to the United States Constitution.

One of the defendants in the Ellis case is William F. Crockett, an attorney, who had not been a party to the pertinent foreclosure case. Crockett was accorded civil immunity in the collateral Ellis suit to set aside the foreclosure judgment for the reason the suit was barred against his mortgagee principals by collateral estoppel. Yet, in this case, the appellate court holds petitioners who were parties in the first case (and a fortiori entitled to immunity) subject to civil liability on a surety contract and in tort for a paper deficiency of their principal, waived by the mortgagee in its first suit. Again, the appellate court abridged petitioners' immunities from relitigation, immunities firmly recognized and accorded to Crockett, et al. in the Ellis case, supra. It discriminated against petitioners in the application of pertinent law.

Rule 16 of the Rules of the Supreme Court of Hawaii, which provides procedures for disciplining attorneys, was adopted after the decision of the appellate court in In Re Bouslog-Sawyer, 41 Haw. 403 (reversed 360 U.S. 622). The appellate court itself has enunciated the principles that in disciplining attorneys, "the essential elements of notice and opportunity to be heard must be preserved" and that "civil liability is not determinable and has no effect in disciplinary proceedings." In Re Trask, 46 Haw. 404 (1963) at pp. 410, 415 and 414, respectively.

The censure of Petitioner Corey by the appellate court in its Opinion, without notice or hearing, on the basis of his civil liability, is a clear violation of his constitutional rights to due process of law and equal protection of laws accorded others in like circumstances, guaranteed by the Fourteenth Amendment to the United

States Consfitution.

The appellate court having refused petitioners due process of law on the federal questions raised at the first opportunity in the Petition for Rehearing the only forum left to the petitioners for the vindication of their federal constitutional rights is this Honorable Court. Cf. Missouri v. Gehner, 281 U.S. 313; Saunders v. Shaw, 244 U.S. 317.

CONCLUSION

> ". . . (M)axims of constitutional law are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be the government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." Yick Wo v. Hopkins, supra, at 370.

The case before this Court raises federal questions so very fundamental and so very far-reaching in the administration of justice in civil actions under the American concept of human rights that an imperative duty rests upon this Court to grant certiorari. Gulf, Colorado & Santa Fe Railway Co. v. Ellis, supra, at 159.

The youngest state of the Union must be restored by this Court to a government of laws rather than a government of men. Yick Wo v. Hopkins, supra, at 370.

DATED: Honolulu, Hawaii, this ____ day of March, 1972.

Respectfully submitted:

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Honolulu, Hawaii 96813

APPENDIX A

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

Fourteenth Amendment to the Constitution of the United States, Section 1:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

U.S.C.A., Const., Amend. 14, Sec. 1, pp. 3-4.

Hawaii Revised Statutes

"§ 1-1 Common law of the State; exceptions. The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent or established by Hawaiian usage; provided, that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State." [L 1892, c 57, § 5; am L 1903, c 32, § 2; RL 1925. § 1; RL 1935, § 1; RL 1945, § 1; RL 1955, § 1-1]"

"§ 1-6 Prohibitory law, effect. Whatever

is done in contravention of a prohibitory law is void, although the nullity be not formally directed. [CC 1859, § 8; RL 1925, § 8; RL 1935, § 8; RL 1945, § 7; RL 1955, § 1-9]"

"§ 602-13 Additional argument by counsel. Upon all questions arising under the exercise of the jurisdiction of the supreme court, when argument of counsel is desired or intended by the parties, or is requested by the court, the court may order the argument to be had. After the argument of any cause, or when the cause is submitted on briefs, if the court is of opinion that a certain point or legal proposition is involved which is material to the decision of the case and which has not been raised or argued by counsel on either side, the case shall not be decided on such point or proposition until counsel for both sides have had an opportunity of arguing the point or proposition before the court. [L 1892, c 57, § 57; RL 1925, § 2232; RL 1935, § 3601; RL 1945, § 9612; RL 1955, § 214-12]"

§ 605-9 Amenable for misconduct. The practitioners shall be summarily amenable to the courts of record and may be fined or imprisoned for satisfactory cause upon the complaint of any party aggrieved by their malpractice, or for nonpayment of moneys collected by them for private parties, or for any fraud, deceit, or other gross misconduct. [CC 1859, § 1066; am L 1921, c 81, § 2; RL 1925, § 2312; RL 1935, § 3611; RL 1945, § 9709; RL 1955, § 217-9]"

RULE 5. REHEARING

(a) *Time and Form.* A petition for rehearing may be presented only within 10 days after the filing of the opinion or ruling unless by special leave additional time is granted during such period by a justice. The petition shall briefly and distinctly state its grounds and shall include points and authorities relied on in support thereof and shall also be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay.

(b) *Argument; Reply; Allowance.* No reply to a petition for rehearing will be received unless requested by the court or by a justice who concurred in the opinion or ruling and no petition for rehearing will be granted in the absence of such a request. There shall be no oral argument on a petition for rehearing.

RULE 10. JUDGMENT; MANDATE

Judgment; Mandate. In all cases a final judgment of this court pursuant to the opinion or ruling disposing of the cause before this court shall be prepared by the prevailing party and submitted to the clerk for entry and filing within 10 days. Upon presentation to the clerk, the clerk shall forthwith present the same to a justice for approval and upon approval, the same shall forthwith be entered and filed. Upon expiration of the time for filing a petition for rehearing, or if such petition has been timely filed, upon the disposition of such petition, a mandate shall issue in appeals as a matter of course informing the court below of the proceedings in this court and of any further required proceedings; provided that the mandate may issue at any time after the entry of final judgment on the order of the court. Upon motion for cause shown the mandate may be stayed or any mandate that has been issued may be recalled.

RULE 16. UNPROFESSIONAL CONDUCT AND UNAUTHORIZED PRACTICE OF LAW

(a) *Canons.* The Canons of Professional Ethics attached hereto as Exhibit A shall govern the conduct of the members of the Hawaii Bar.

(b) *Appointment of Commission.* The court shall appoint a commission of not less than 15 members of the Hawaii Bar as commissioners of this court in proceedings involving unprofessional conduct of members of the Hawaii Bar and unauthorized practice of law by any person, and shall designate the chairman thereof. The terms of office of the commissioners shall be designated by the court. They shall receive no compensation for their services but may be reimbursed for their traveling and other expenses incidental to performance of their duties.

(c) *Functions, Powers and Duties of Commissioners and Committee on Inquiry; Procedure.*

(1) The commission is empowered to inquire into and investigate charges of unprofessional conduct by members of the Hawaii Bar and unauthorized practice of law by any person and, upon the filing with the commission of a written complaint of such unprofessional conduct or unauthorized practice, to hear and determine the charges and report its findings and recommendations to this court.

(2) The commission shall adopt rules for its procedure and file them with the clerk of this court. Such rules shall become effective upon approval of this court.

(3) Any person, including the Attorney General and the Bar Association, may file a charge with the commission.

(4) Whenever a charge of unprofessional conduct or of unauthorized practice of law is received, the chairman of the commission, unless otherwise ordered by two-thirds of the commission, shall appoint a committe on inquiry consist-

ing of 3 or more members of the bar and refer the charge to it, if in his opinion the charge alleges a violation of the canons of professional ethics or unauthorized practice of law. The chairman of the committee on inquiry shall be a commissioner.

(5) The committee on inquiry shall conduct its investigation promptly. It shall have power to summon witnesses and to hear testimony, and may conduct its investigation in such manner as may be necessary and proper to obtain all pertinent information. The respondent, i.e., the person against whom a charge has been made, shall be notified in writing by the committee of such investigation and shall have a right to be heard.

(6) The committee on inquiry shall submit a written report of its findings and recommendations to the commission. If the committee recommends that no hearing be held on the charge of unprofessional conduct or unauthorized practice of law, and if the commission concurs with the recommendation, the matter shall be closed. The chairman shall thereupon notify the complainant and the respondent of the commission's action. If the commission does not concur with the recommendation of the committee, the commission may instruct its chairman to appoint a new committee on inquiry, and if two-thirds of the commission does not concur with the recommendation of the committee, the hearing of the charge may be held by the commission or the charge dismissed as the case may be.

(7) If the committee on inquiry recommends that a hearing be held on the charge of unprofessional conduct or unauthorized practice of law, it shall prepare and submit to the chairman of the commission a written complaint and a report in support thereof.

(8) A complaint shall be sufficiently clear and specific to inform the respondent of the alleged unprofessional conduct or unauthorized practice.

(9) Upon receipt of the complaint, the chairman of the commission shall cause a copy thereof to be served upon the respondent by personal service, together with a copy of the rules of the commission, if any. Personal service upon the respondent may be made by any person who is at least 20 years of age, including any commissioner. In the event that the respondent cannot be found within the State of Hawaii or has departed therefrom, service may be made by registered or certified mail if his address is known. If he cannot be found

within the state and if his address is not known, service may be made upon the clerk of this court. The respondent shall file with the commission a written answer to the complaint within 30 days after the date of service, which time may be extended by the chairman of the commission.

(10) If the respondent's answer involves any questions of law, a memorandum in support thereof shall be attached to the answer. A respondent waives all defenses and objections not presented in his answer, except the defenses (a) that the complaint fails to allege acts or omissions constituting unprofessional conduct or the unauthorized practice of law; (b) that the commission lacks jurisdiction of the subject matter. If the respondent fails to file an answer in the time allowed, he shall be in default.

(11) Nine members of the commission shall constitute a quorum for determining what action is to be taken upon the recommendation of a committee on inquiry and for determining whether a hearing on the charge should be had by the commission without prior reference to a committee on inquiry. At the hearing of the complaint by the commission, the committee on inquiry, or such other attorney or attorneys as are designated by the chairman of the commission, shall present evidence in support of the allegations of the complaint. Three members of the commission shall constitute a quorum for a hearing in each case coming before it. In the event of a recessed hearing, a quorum at each hearing after the first hearing shall be three commissioners who have attended all of the previous hearings. No commissioner who was a member of the committee on inquiry investigating the charges shall be qualified to hear the mattter. The hearing of such complaint by the commission shall be completely and accurately recorded.

(12) The proceedings under this rule shall not be public but shall be private and confidential unless the respondent shall in writing request otherwise. The record shall not be made public unless and until a report recommending discipline or recommending that a judgment be issued is filed with the court and the court has acted thereon.

(13) Committees on inquiry, by their chairmen, and commissioners hearing charges may administer oaths and affirmations and compel by subpoena the attendance of witnesses and the production of pertinent books, papers and documents. Writs of subpoena shall be issued in blank by the clerk of this court upon application by any commissioner or the respondent. A witness shall be paid mileage and witness fees as pro-

vided by the law of this state in civil cases. Failure to obey any such subpoena or refusal without lawful grounds of any person to be sworn to testify or to answer any proper question shall constitute contempt of this court. Part V of the Hawaii Rules of Civil Procedure, relating to depositions and discovery, shall apply to proceedings before the commission instituted pursuant to this rule.

(14) To warrant a finding of unprofessional conduct or of unauthorized practice of law, the charge must be established by clear and convincing evidence.

(15) After the hearing, if the commission recommends discipline by the court in cases involving unprofessional conduct, or recommends a judgment of the court in cases involving unauthorized practice of law, it shall file a written report of its findings and recommendations with the court. Thereupon the matter shall be docketed in the name of the respondent. The committee on inquiry, Attorney General, or such other attorney or attorneys as are designated by the chairman of the commission, shall act as attorneys for the commission. After the filing of such report a copy thereof shall be served on the respondent as hereinbefore provided for the service of the complaint.

(16) The respondent may file exceptions to the report within 20 days from the date of service of a copy thereof or within an additional period not to exceed 20 days granted by the court for good cause shown. Unless such exceptions are predicated solely on the report, the respondent, within 10 days after the filing of such exceptions, shall file with the commission a designation of such parts of the record as he deems necessary to enable the court to pass on such exceptions, and within 10 days thereafter the attorney for the commission may file a designation of any additional parts of the record deemed necessary to enable the court ot pass on such exceptions. Thereupon the commission shall promptly certify to the court the parts of the record so designated and furnish a copy thereof to the attorney for the commission and a copy thereof to the respondent.

(17) Within 60 days after the filing of the certified record, or after the filing of exceptions if no part of the record is designated by the respondent, the respondent shall file an opening brief pursuant to the rule governing civil appeals and other briefs shall be filed as therein provided.

(18) If the respondent fails to file exceptions within the time permitted by the rule, upon motion made by the attorney for the commission the court may enter an order giving effect to the recommendations contained in the report. The court shall adopt the findings of the commission unless upon a consideration of the entire record it is of the opinion that such findings are not supported by clear and convincing evidence.

(d) *Limitations.* The jurisdiction of this court and the other courts of the State of Hawaii to grant appropriate relief in causes involving unprofessional conduct or unauthorized practice of law shall not be deemed to be limited, restricted or abrogated by anything contained in this rule.

APPENDIX B

OPINION BELOW

No. 5021

APPEAL FROM FIRST CIRCUIT COURT
HONORABLE THOMAS S. OGATA, JUDGE

September 9, 1971

RICHARDSON, C.J., ABE AND KOBAYASHI, JJ., AND CIRCUIT JUDGE HAWKINS IN PLACE OF MARUMOTO, J., DISQUALIFIED, AND CIRCUIT JUDGE M. DOI IN PLACE OF LEVINSON, J., DISQUALIFIED

JUDGMENT — *res judicata.*

The doctrine of res judicata precludes the relitigation, not only of the issues which were actually litigated in the first action, but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided.

SAME — *collateral estoppel — claims barred.*

Collateral estoppel is an aspect of res judicata which precludes the relitigation of a fact or issue which was previously determined in a prior suit on a different claim between the same parties or their privies.

APPEAL AND ERROR — *jury determination — finality of findings.*

A jury finding on a factual issue supported by substantial evidence may not be set aside by the court.

TRIAL — *sufficiency of evidence — directed verdict.*

On a motion for a directed verdict, the evidence and the inferences which

may be fairly drawn therefrom must be considered in the light most favorable to the party against whom the motion is directed, and if the evidence and the inferences so viewed are of such character that reasonable persons in the exercise of fair and impartial judgment may reach different conclusions upon the crucial issue, then the motion should be denied and the issue submitted to the jury.

OPINION OF THE COURT BY KOBAYASHI, J.

This appeal is the result of a suit initiated by State Savings & Loan Association (hereinafter State Savings or plaintiff) against Robert M. Kimbrough (hereinafter Kimbrough), Ralph E. Corey (hereinafter Corey) and Wallace C. S. Young (hereinafter Young) (hereinafter collectively called defendants) for a mortgage loan made by State Savings in favor of Kauaian Development Company, Inc. (hereinafter Kauaian Development).

In Count I of the complaint, State Savings alleged that though Kimbrough, Corey and Young were personally obligated through a written undertaking to discharge certain mechanic's liens of Kauai Commercial Company, Limited (hereinafter Kauai Commercial), they failed to discharge said liens. In Count II, State Savings alleged fraud, encompassing representations made to State Savings by Kimbrough, Corey and Young in their procurement of a mortgage loan from State Savings for Kauaian Development.

Young instituted a cross-claim against Kimbrough and Corey, claiming that if any judgment is obtained against Young then Kimbrough and Corey be held liable for the full amount of the judgment.

The following jury verdicts are pertinent in this appeal:

1. On Count I, in favor of State Savings and against Kimbrough, Corey and Young;

2. In regard to Young's cross-claim in Count I, in favor of Kimbrough and Corey and against Young;

3. On Count II, in favor of State Savings and against Kimbrough and Corey, but not against Young.

Judgment was accordingly entered.

Subsequently the judgment above was set aside and the following judgment was entered which:

1. As to Count I, entered a judgment notwithstanding the verdict in favor of Kimbrough, Corey and Young;

2. As to Count II, affirmed the judgment of liability for fraud against Kimbrough and Corey but ordered a new trial solely on the issue of damages for fraud.

This appeal comes from the foregoing, as follows:

1. By State Savings from the final judgment notwithstanding the verdict on Count I and by State Savings in the form of an interlocutory appeal with regard to the granting of a new trial on the issue of damages under Count II;

2. By Kimbrough and Corey from the judgment affirming the fraud in Count II;

3. By Young from the judgment in favor of Kimbrough and Corey and against Young in his cross-claim in Count I.

I. FACTS

Kimbrough, Corey and Young were the principal officers and stockholders of Kauaian Development. Kimbrough and Corey were president and vice president-general counsel, respectively. At the inception of the dealings between the parties to this case, Kimbrough and Corey met with a representative of State Savings to work out the figures for the proposed loan. After many negotiations State Savings agreed to a mortgage loan of 65% of the appraised value of the land and construction costs.

Pursuant to this arrangement Corey submitted to State Savings a financial statement of a proposed hotel condominium which included a specific cost for construction in the amount of $761,500.00. This statement was signed by Corey as vice president of Kauaian Development. Kauaian Development already had a contract in existence with the contractor, Better Built Hawaii, Ltd. (hereinafter Better Built), for construction of the hotel condominium at a cost price of $600,000.00, less than that represented to State Savings. This previously made contract between Kauaian De-

velopment and Better Built was evidenced by a letter agreement signed by the president of Better Built and Kimbrough for Kauaian Development. The essence of this agreement provided that the higher construction cost figure given to State Savings was to be considered as between Better Built and Kauaian Development "for financing purposes only", and was not to modify their existing agreement at the lower cost figure.

Subsequently State Savings was furnished, at its request, a copy of what was purported to be the contract between Better Built and Kauaian Development. It was signed by the president of Better Built and by Kimbrough as president of Kauaian Development. It included the same higher construction cost figure previously submitted by Corey to State Savings.

The closing documents for the mortgage loan in the amount of $857,000.00, based in part upon the higher construction figure represented to State Savings, were signed and formally executed. During the process of preparing for the closing it became apparent that the total amount of the loan as proposed would not cover the total expected cost to finish the construction, which had already started. In order to assure that this deficiency would be met and that there would be sufficient funds to complete the construction, State Savings accepted Kimbrough's, Corey's and Young's personal guarantee that any such funds would be paid by them. In part this agreement reads as follows:

> This statement shows an additional amount to be received from the development company to provide for all loan disbursements in the amount of $46,485.50. Although the loan is made to the corporation, of which the undersigned are officers, it is hereby agreed that the undersigned officers pledge their personal liability for the above amount of money, or any other amount of money that may be necessary, to complete the proposed Hyatt House development on the island of Kauai. We guaranty

that this money will be available for the payment of expenses to complete this project as originally proposed in the mortgaging agreements.

This agreement was signed by Kimbrough, Corey and Young.

Under the mortgage loan arrangement, construction progress payments were to be paid to Kauaian Development rather than Better Built as requested by defendants. Eventually all the progress payments under the loan were made, the construction was completed and the hotel condominium started its operation.

Repayment of the mortgage loan became delinquent and State Savings instituted, in the fifth circuit court in Civil No. 636, a mortgage foreclosure proceeding against Kauaian Development and the individual unit owners. The court in said case ordered that the property be foreclosed and sold to pay the balance due on the mortgage and two mechanic's liens which were adjudged to have priority over the mortgage. The mechanic's liens totalled $28,506.70. The court ordered the property sold at public auction at an upset price of $1,051,200.80. This amount included the balance due on the mortgage, the mechanic's liens and the foreclosure expenses. There were no bidders at the upset price sale.

The court determined that the property should be sold with no upset price. At the second sale State Savings itself purchased the property for $913,000.00. This left a difference of $138,200.80 between the purchase price and the upset price.

The jury in the instant case, which is now on appeal, rendered a verdict of $28,506.70, the amount of the mechanic's liens, on Count I under the written guarantee agreement against defendants Kimbrough, Corey and Young. Under Count II for fraud, a verdict of $109,694.10 was rendered against defendants Kimbrough and Corey. These two fig-

ures total the $138,200.80 difference between the upset price and the purchase price.

II. ISSUES

The questions before us that we consider necessary to answer are: (1) Whether the defense of res judicata is applicable to the present case; (2) Did the trial court err in setting aside the judgment on Count I and granting a judgment notwithstanding the verdict? (3) Did the trial court err when it failed to grant a judgment notwithstanding the verdict on Count II? (4) Did the trial court err in granting a new trial on the issue of damages for Count II? (5) Did the trial court err in denying defendant Young's motion for judgment notwithstanding the verdict or in the alternative for a new trial on his cross-claim against defendants Kimbrough and Corey with respect to Count I?

III. RES JUDICATA

The essence of defendants' arguments on this issue is that the final judgment in the prior mortgage foreclosure action should act as a bar to the present action under the doctrine of res judicata. Their primary contention is that the lower court erred in failing to dismiss the complaint and in failing to direct a verdict on this issue.

This court in *Ellis v. Crockett*, 51 Haw. 45 (1969), at page 55, set forth the doctrine of res judicata as follows:

> The doctrine of *res judicata* basically provides that "[t]he judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation, not only of the issues which were actually litigated in the first action, but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided." *In re Bishop Estate*, 36 Haw. 403, 416 (1943).

It is clear from the *Ellis* case that the doctrine of res judi-

cata primarily turns on those matters which might have been "properly litigated" in the first action. As such the question presented is whether the present claim should have been included in the mortgage foreclosure suit.

There was presented at trial conflicting evidence as to what point in time State Savings learned of the double contracting. Testimony was given indicating that State Savings' representative may have learned about the lower construction contract during his counsel's preparation for the foreclosure action. It is defendants' contention that even if State Savings were ignorant of the fact supporting the fraud claim in Count II, this ignorance was due to State Savings' own negligence. Defendants maintain that State Savings either was or should have been fully cognizant of the double contracting prior to the commencement of the foreclosure action. They cite numerous authorities providing that if a party's ignorance of a claim is the product of his own negligence in that he should have been aware of facts supporting it, then he is barred by res judicata from asserting his claim in a second action. *Guettel v. U.S.*, 95 F.2d 229, 232, *cert. denied*, 305 U.S. 603.

Defendants further rely heavily on this court's decision in the *Ellis* case, *supra*. They contend that our decision in that case "has already decided that in a mortgage foreclosure action, an action for fraud allegedly founded on the mortgage transaction *must* be litigated, or the right of action is lost". This construction by defendants of our holding in that case as a precedent for the decision in this case is grossly inaccurate. Initially it is evident that the factual situation in the instant case makes the *Ellis* case readily distinguishable on its face. In *Ellis* we held that the subsequent claim should have been raised as a compulsory counterclaim in the previous action. But of even more significance is the fact that the present defendants have misstated our use of the doctrine of res judicata as set forth in the *Ellis* case. It is apparent from State Savings' brief that they too have misconstrued our decision in *Ellis*.

In the *Ellis* holding, this court specifically differentiated between the doctrines of res judicata and collateral estoppel. As quoted from the *Ellis* case earlier in this opinion, res judicata "precludes the relitigation, not only of the issues which were actually litigated in the first action, but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided". Quoting further from the *Ellis* case, page 55, "Collateral estoppel is an aspect of res judicata which precludes the relitigation of a fact or issue which was previously determined in a prior suit on a different claim between the same parties or their privies. *Yuen v. London Guarantee and Accident Co.*, 40 Haw. 213, 223 (1953); *Henderson v. Pence*, 50 Haw. 162, 163, 434 P.2d 309, 310 (1967)." Then we went on to say that it was collateral estoppel that was applicable in that case, not res judicata generally. "The claim before us today is clearly not the same claim for which relief was sought in the prior foreclosure case. . . . Also the legal consequences of a successful completion of the litigation would be different. Since this is a different claim, the only way the present plaintiff may be barred is through collateral estoppel. Applying the above described rules, the present plaintiffs are barred as to any claim they may assert against any of the defendants with respect to issues actually litigated between the persons who were parties in the foreclosure suit." *Ellis*, *supra* at 56-57. As such it is evident that collateral estoppel, not res judicata, was applied in the *Ellis* case, contrary to defendants' assertion.

Applying the above principles to the present case, defendants' defense of res judicata must fail. We need not reach the question whether the parties and subject matter in the present case are the same as those in the prior mortgage foreclosure action. The fact that plaintiff's damages were not known at the time of the mortgage foreclosure action is determinative of the res judicata issue. The present claim could not have been "properly litigated", as that term is used in the *Ellis* case, at the time of the mortgage foreclosure

action because at that time it was not known whether State Savings would suffer any damages from defendants' default on the mortgage. The damages were capable of being determined only after the mortgage was foreclosed and the property sold at a loss to the mortgagee, State Savings. Had the property been foreclosed at a gain sufficient to cover the damages under both Counts I and II, State Savings would not have had a valid claim. As such the defense of res judicata is not applicable to the facts in the present case. The fact that State Savings may have known about the fraud when it brought the mortgage foreclosure action is not sufficient. It did not know the extent of its damages or even whether it would have any at that time.

IV. JUDGMENT NOTWITHSTANDING THE VERDICT ON COUNT I

The jury returned a verdict in favor of State Savings on Count I against defendants Kimbrough, Corey and Young for $28,506.70, an amount equal to the unpaid mechanic's liens. The trial court granted judgment to defendants notwithstanding the jury verdict. Count I relates to the written undertaking, a guarantee agreement, signed by all three defendants.

As to Count I, the jury was instructed in part as follows: "In construing the written undertaking . . . you may consider . . . all testimony adduced with regard to what the parties intended at the time the document was prepared and executed. . . . [I]f you find that the completion of the project as originally proposed in the mortgaging agreements was paid for in full, then you must return a verdict in favor of the defendants."

The trial court in granting judgment notwithstanding the verdict gave the following reasoning in part: "And the reason for granting the motion for a judgment notwithstanding the verdict is, as the court indicated previously, that the evidence shows affirmatively that all payments due [to the contractor from the developers] . . . had been made on the contract as amended, and we are talking about the $600,000

contract . . . and under the contract as amended, the contractor was paid in full."

The $600,000.00 construction contract to which the trial court referred is the lower costing contract brought out in the statement of facts concerning the double contracting by defendants. As stated previously, defendants represented to State Savings that the construction contract was for a higher figure, $761,500.00. Under the written guarantee agreement, defendants agreed to provide all funds in excess of the mortgage loan necessary "to complete this project as originally proposed in the mortgaging agreements". The trial court, using the $600,000.00 contract, found that the contractor had been paid in full and gave judgment notwithstanding the verdict. In doing so, the trial court substituted its judgment for the jury's and found that the $600,000.00 contract was part of the mortgaging agreements rather than the $761,500.00 contract that had been submitted to State Savings.

The amount of the verdict under Count I, $28,506.70, comes well within the balance between the $761,500.00 contract and the amount actually paid the contractor. Had the contractor received the full $761,500.00, as was represented to State Savings, it is reasonable to assume that the mechanic's liens would have been paid. Since it was the $761,500.00 contract that was represented to State Savings as being the true contract between developer and contractor, it was correct for the jury to take it into consideration under Count I. As such the trial court committed error in relying on the lesser contract in overturning the jury.

The jury had the written guarantee agreement, a copy of what was represented to State Savings as the construction contract, and testimony from all parties involved upon which to base its verdict. It has long been the law in this jurisdiction that verdicts based on conflicting evidence will not be set aside where there is substantial evidence to support a jury's findings. *Ashford v. Thos. Cook & Son, Ltd.*, 52 Haw. 113, 123, 471 P.2d 530, 536 (1970); *Fernandez v. Hao*,

43 Haw. 335, 336 (1959); *Louis v. Victor*, 27 Haw. 262, 263 (1923). There was sufficient evidence for the jury to find for State Savings on Count I. As such the judgment granted by the trial court should be reversed as to Count I and the jury verdict reinstated.

V. THE JURY VERDICT ON COUNT II

When the jury returned its verdict on Count II, defendants Kimbrough and Corey filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial. Listed among the grounds were "that the evidence adduced by the plaintiff failed to support a claim upon which relief could be had" and that "the verdict of th jury was against the weight of the evidence". The trial court denied the motion. This court finds defendants' grounds without merit and affirms the action of the trial court.

The jury was properly instructed by the trial court as to all the elements that must be proven by State Savings in an action for fraud. The jury verdict is fully supported by all the documents that were entered in evidence, including those that constituted the mortgaging agreements. In addition there is the testimony of all parties involved, including the individual defendants and the president of the contracting company. More specifically, the jury had the testimony of State Savings' representative to the effect that among other things he relied on the $761,500.00 construction contract as represented to him in making the mortgage loan. There was substantial evidence to support the jury verdict. The trial court is thus affirmed in denying defendants' motion for the same reasons cited in upholding the jury verdict on Count I.

VI. DAMAGES ON COUNT II

The question here presented is as follows: Did the trial court err in granting defendants Kimbrough's and Corey's motion for a new trial as to damages on Count II?

The trial court in granting the motion, believed that it

erred in failing to allow defendants to introduce evidence as to a subsequent resale of the property by State Savings to a third party after State Savings had purchased the property at the second foreclosure sale.

The facts show that State Savings' damages on Count II were determined in the following manner: The court, in the previous mortgage foreclosure suit, originally ordered the property sold at public auction at an upset price of $1,051,200.80. This amount included the balance due on the mortgage, the mechanic's liens and the foreclosure expenses. At the second sale State Savings bought the property for $913,000.00. This left a loss of $138,200.80 on the sale. State Savings, in the present case on appeal, recovered the amount of the mechanic's liens, $28,506.70, on Count I. The balance, $109,694.10, was the amount returned by the jury on Count II.

It is not disputed that the mortgage foreclosure sale itself was conducted properly under the law. The sale was conducted and confirmed by the court in that action. As such this court considers it irrelevant to the action at hand that State Savings itself was the buyer of the property at that sale. Concerning the issue of damages in the present case, the only fact resulting from the sale that is relevant is the amount of the proceeds from the foreclosure sale. State Savings' damages would certainly not be computed any differently had it not resold the property or had another party bought the property at the foreclosure sale. Therefore, the fact that State Savings subsequently sold the property has no bearing on this case and the facts surrounding this sale were properly disallowed.

State Savings confuses this issue by going into a lengthy discussion in its brief on the difference between the "benefit of the bargain" theory of computing damages for fraud and the "out of pocket" theory. It would have the court at this time adopt one theory or the other for this jurisdiction. Under the "benefit of the bargain" rule, State Savings would be entitled to have its mortgage note paid in full, that

is what it bargained for. Using the "out of pocket" theory, the less is the deficiency under the mortgage note. In both instances the expenses of the foreclosure sale that were a portion of the upset price would be included in the damages computation. It is conceded by State Savings that in this case it makes no difference which theory is used, the monetary damages are the same.

The "benefit of the bargain" rule, as used in this context, is ordinarily applicable in those situations where the buyer of property is defrauded as to its value at the time of sale. *Louis Steinbaum Real Estate Co. v. Maltz*, 247 S.W.2d 652 (Mo. 1952). In such a situation the price of a subsequent resale is admitted to show the actual value of the property when fraudulently sold. It is evident that that situation is entirely different from the case at hand. Here we have a mortgagee who was defrauded not as to the value of the property but as to the value of a construction contract upon which the amount of the loan was determined. As such a sale of the property by anyone subsequent to the foreclosure sale when the damages were determined is completely irrelevant to the damage issue.

Some jurisdictions have taken the view that no strict rule should be adopted and have held that either the "benefit of the bargain" or the "out of pocket" rule should be applied depending on the rule most applicable to the case at hand. In such situations a flexible rule is used which would apply a different theory depending on the equities and proof available in each case. *Rice v. Price*, 340 Mass. 502, 164 N.E.2d 891 (1960); *Hunt v. Sherrill*, 195 Miss. 688, 15 So. 2d 426 (1943); *Zeliff v. Sabatino*, 15 N.J. 70, 104 A.2d 54 (1954); *Gnash v. Saari*, 44 Wash. 2d 312, 267 P.2d 671 (1954). We are of the opinion that this court should not bind itself to any one rule at this time.

VII. CROSSCLAIM ON COUNT I

Did the trial court err in denying Young's motion for judgment notwithstanding the verdict or in the alternative

for a new trial on his cross-claim against Kimbrough and Corey with respect to Count I?

Young's cross-claim essentially states that if any judgment is obtained against him then the other defendants are liable to him for the full amount thereof since they handled all transactions with State Savings. The trial court gave the jury Young's requested instruction on Count I. It provided that if the jury found that Young executed the written undertaking based solely upon misrepresentations of either of the other defendants then the jury should find in favor of Young.

We have stated that verdicts based on conflicting evidence will not be set aside where there is substantial evidence to support the jury's findings. More particularly, in relation to directed verdicts we have held in *Chambers v. City and County of Honolulu*, 18 Haw. 539, 541, 406 P.2d 380, 382 (1965), quoting from *Young v. Price*, 47 Haw. 309, 313, 388 P.2d 203, 206 (1963): *Young v. Price*, 18 Haw. 22, 24, 395 P.2d 365, 367 (1964), that: "[O]n motions for a directed verdict, the evidence and the inferences which may be fairly drawn from the evidence must be considered in the light most favorable to the party against whom the motion is directed and if the evidence and inferences viewed in that manner are of such character that reasonable persons in the exercise of fair and impartial judgment may reach different conclusions upon the crucial issue, then the motion should be denied and the issue should be submitted to the jury."

The facts were in dispute in this case as to the relationships among the defendants. Young testified that he did not know what was going on in reference to the mortgage negotiations and that the only reason he signed the written undertaking was because Kimbrough and Corey requested him to do so. Kimbrough and Corey testified, on the other hand, that Young was a full participant for the Kauaian Development during the procurement of the mortgage. In addition Young was a major stockholder and officer of Ka-

uaian Development at the time he signed the written undertaking. When the time came to close the loan, Kimbrough was hospitalized and Young played an integral part in the mechanics of that process. It is evident that, just as there was sufficient evidence for the jury to find in favor of Young on the fraud in Count II, there was sufficient evidence to find him liable on the written undertaking in Count I.

VIII. ATTORNEY COREY'S CONDUCT

A substantial portion of the substance of this case involved an activity that could be considered fraudulent. Defendants herein misrepresented to a prospective mortgagee the true nature of the contract between developer and contractor upon which the mortgagee relied in determining the amount of the loan. It was suggested by defendants' counsel in oral argument that this type of activity, double contracting by developer between the contractor and the prospective mortgagee, is a commonplace procedure for the trade in this type of situation. No evidence of such practices having been accepted in the business community of Hawaii or any other jurisdiction was presented to this court. We feel it pertinent to specifically admonish the perpetrators of such conduct. In many instances a fraudulent act will overshadow contemporaneous acts that would, taken alone, have been considered legitimate activity.

In particular, this court questions the status of defendant Corey in this case. Young testified that he relied upon Corey as his attorney during the negotiation for the mortgage. We do not presume to characterize the relationship between Corey and Young in this transaction as attorney-client. And yet an attorney, as an officer of the court, owes a special duty to the public, his client and the bar to keep his conduct beyond reproach, whether it be in or outside the scope of his status as an attorney. A lawyer should avoid even the appearance of professional impropriety. Code of Professional

Responsibility, Canon 9. The conduct of attorney Corey in this case raises serious questions of impropriety.

IX. CONCLUSION

The verdict of the jury as to all counts is reinstated and the order of the trial court for a new trial on the issue of damages is reversed. Remanded for entry of judgment consistent with this opinion.

James S. Campbell (*Peter Chi-Ping Char* with him on the briefs, *Cades, Schutte, Fleming & Wright* of counsel) for plaintiff-appellee, cross-appellant State Savings & Loan Association.

Helen B. Ryan (*Ryan & Ryan* of counsel) for defendants-appellants, cross-appellees Robert M. Kimbrough and Ralph E. Corey.

Asa M. Akinaka (*Padgett, Greeley, Marumoto & Akinaka* of counsel) for defendant-appellant, cross-appellee Wallace C. S. Young.

APPENDIX C

PETITION FOR REHEARING AND MOTION TO AMEND OPINION BY STRIKING

TO THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF HAWAII:

Appellants RALPH E. COREY and ROBERT M. KIMBROUGH respectfully request the Court to reconsider its Opinion entered in the above entitled cause on September 9, 1971 and to grant Appellants a rehearing in the above entitled cause under Rule 5(a) of the Rules of the Supreme Court of the State of Hawaii. The grounds for said request are as follows:

I.

The Court's Opinion Exceeds the Authority of the Court Inasmuch as by State Action it Impairs the Obligation of Contracts in Violation of Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States.

The Record below, and those portions of the

Record in Fifth Circuit, Civil No. 636, which were filed as a supplemental record on this appeal, show the following uncontroverted facts:

State Savings and Loan, as mortgagee, entered into a mortgage contract with Kauaian Development Company, Inc., securing a note in the principal sum of $857,000.00.

Appellants Kimbrough and Corey did not personally endorse the mortgage note.

State Savings and Loan disbursed only $822.720 to Kauaian Development Company, Inc.; State Savings and Loan retained the balance, $34,280.00 as an initial service fee (Plaintiff's Exhibit 10).

The corporate mortgagor contracted with Better Built Hawaii, Ltd. to construct improvements according to plans and specifications which were given an estimated value of $761,500 for financing purposes; the contract submitted to

State Savings and Loan was, in the alternative to that face amount, a cost-plus contract. The estimated net loan requirement submitted to the mortgagee for Better Built Hawaii contract cost was $701,500.

The documents showed the need for an additional $46,485.50 to complete the proposed development according to the original plans and specifications.

Appellants Kimbrough, Corey and Young, by a written undertaking drafted by State Savings and Loan, guaranteed this $46,485.50, or any other amount necessary to complete construction according to said original plans and specifications.

The valuation price of $761,500, or costs plus 7%, was the subject of a private contractual agreement between Better Built Hawaii, Ltd. and Kauaian Development Co., Inc. There is no

contract or other evidence indicating a legal obligation upon Kauaian Development Company to reveal the privately adjusted contract price to State Savings and Loan. (Cf. Ellis vs. Crockett, 51 Haw. 45, p. 54).

The premises valued at $761,500 were completed by Better Built Hawaii, Ltd. in accordance with the plans and specifications submitted to the lending institution for an adjusted cost of $600,000, plus three apartments in the development valued at $60,000. See testimony of Emil Offer, President of Better Built Hawaii, Ltd. (TR. 587).

Kauaian Development Company, Inc. paid its contract price of $660,000 to Better Built Hawaii.

Better Built Hawaii defaulted in its own contractual duty to pay over to two of its subcontractors the amount of their liens; that is $28,506.70,

including court costs and attorneys' fees.

Emil Offer's testimony was that the liens in the sum of $28,506.70 were for extras added to the project in addition to the plans and specifications which accompanied the mortgage application (TR. 587 and following).

At no time did Appellants Kimbrough and Corey enter into a contract with State Savings and Loan that they would guarantee anything other than the construction costs as the project was originally planned.

This Court misunderstands the evidence when it tries to demonstrate mathematically that the liens would not have occurred had the contractor received the full $761,500 (or cost plus 7%) for the project as originally proposed in the mortgaging instruments. According to Mr. Offer's testimony, Better Built Hawaii would not have paid these liens because they were for

extras not included in the original contract and were in dispute between Better Built Hawaii and Kauaian Development Company.

Whether or not the $28,506.70 mechanic's liens were for extras or for elements of the original contract is immaterial in the final analysis, for the reason that the amount was fully paid from the proceeds of foreclosure sale. Thus, the Opinion errs when it states that: "The jury returned a verdict in favor of State Savings on Count I against Kimbrough, Corey and Young for $28,506.70, an amount equal to unpaid mechanic's liens." (Opinion, p. 10) (emphasis supplied).

It is immaterial that State Savings was the purchaser at the foreclosure sale. The $28,506.70 is included in the $913,000 capital investment in the premises.

Since January 1, 1893, this Court has not

had jurisdiction to decide matters at nisi prius. This Court has no jurisdiction to decide hypothetical or moot questions.

Hence, the finding in the Opinion that "Had the contractor received the full $761,500.00, as was represented to State Savings, it is reasonable to assume that the mechanic's liens would have been paid." (Opinion, p. 11), is not only hypothesizing on a moot question, but is doing so impermissibly at nisi prius.

The quoted hypothesis was not only an impermissible indulgence on the part of this Court, it was a legally impermissible hypothesis for the jury. It rewrites the guarantee contract by eliminating the phrase "as originally proposed in the mortgaging agreements" and substitutes therein an agreement to guarantee payment to Better Built Hawaii in the sum of $761,500.00.

The law of Hawaii, which the Opinion over-

looks, has been in force since Burbank vs. Wood, 2 Haw. 591, where at pp. 598 and 604-5, the principle is enunciated:

> "Courts have power to enforce contracts, not to make them... Courts must give construction to contracts, and not adjudge whether parties were wise in making them, or whether they have been judicious or unfortunate in fulfilling them."

In rewriting the contracts between State Savings and Loan and Appellants Kimbrough and Corey as well as the contract between Better Built Hawaii, Ltd. and Kauaian Development Co., Inc., the Opinion explicitly impairs the obligations under these contracts.

Article I, Section 10 of the Constitution of the United States provides in part:

> "No state shall... pass any... Law impairing the obligation of contracts..."

This constitutional provision has been interpreted by the courts to mean:

> "A contract having been entered into

between the parties, valid at the time, by the laws of the State, it is not competent even for its legislature to pass an act impairing its obligation, much less could any decision of its courts have that effect."

City of Chicago vs. Sheldon, 76 U.S. 50, pp. 55-56, 9 Wall. 50, 19, L. Ed. 594. See also Thompson vs. Lee County, 70 U.S. 327, 3 Wall. 327, 18 L. Ed. 177; Havemeyer vs. Iowa County, 70 U. S. 294, 18 L. Ed. 38; State of Louisiana ex rel Southern Bank vs. Pilsbury, 105 U.S. 278, 26 L. Ed. 1090.

In other words, judicial decision can no more impair a contract than can a legislative act. Union Bank of Richmond Va. vs. Board of Com'rs. of Oxford N.C., 90 F. 7.

Assuming arguendo, that this Court and the jury were correct, and Messrs. Kimbrough and Corey undertook to guarantee the costs of construction up to $761,500, then the second cause of action for fraud fails for the reason that there was no misrepresentation as to the cost of the construction contract.

The decision of the Court violates Appellants' constitutional rights; a rehearing ought to be held for the argument of this issue, the issue being one not covered on the original presentation to this Court, and arising out of the impermissible conclusions reached in the Opinion.

II.

The Court's Opinion is in Conflict with and in Derogation of Both the Common Law and the Decisional Law of Hawaii. The Opinion, Therefore, Abridges Appellants' Privileges and Immunities and Denies Them Due Process of Law and the Equal Protection of the Law as set Forth in the Fourteenth Amendment to the Constitution of the United States.

A. The Opinion and the Law of Contracts as it Previously Existed in this Jurisdiction:

At the time of the trial of this case, the law as to the construction of contracts was as set forth in Reed and Martin, Inc. vs. City and County, 50 Haw. 347 (1968), where the trial court was criticized for referring the issue to

the jury:

> "The general law is that the construction and the legal effect to be given a contract is a question of law to be decided by the court." citing among other cases Mackenzie vs. King, 30 Haw. 230 (1957).
>
> 50 Haw. at 348-9.

The Opinion herein ignores this rule of law completely, and now criticizes the lower court for substituting "its judgment for the jury's" (Opinion, p. 11). This Court then cites, in support of the proposition that jury verdicts should not be set aside where there is evidence to support a jury's findings: Ashford vs. Thos. Cook & Son, Ltd., 52 Haw. 113, 123, 471 P.2d 530, 536 (1970), a case involving "a factual issue" as to whether plaintiff was a "bona fide purchaser for value of stolen checks"; Fernandez vs. Hao, 43 Haw. 335, 336 (1959); a case where the issue in dispute was the existance of an agreement to do work without further charge; and Louis vs.

Victor, 27 Haw. 262, 263 (1923), which involved a negligence action.

The Court, in its Opinion, did not cite a single case in which the Supreme Court of Hawaii had previously determined that the construction of a contract was a matter for jury consideration. To the contrary, as stated above, it has been the settled law that the construction of a contract is for the court to decide. (Reed & Martin, Inc. vs. City and County, 50 Haw. 347; Mackenzie vs. King, 30 Haw. 230; see also authorities cited at 30 Haw. 236 including: 2 Elliot on Contracts, Section 1564; 1 Thompson on Trials [2d. Ed.] Sections 1072, 1073, pp. 901, 902 citing in footnote 35 the leading case of Macbeath vs. Haldimand, 1 T.R. 172, 180, 181, 182.)

B. The Opinion and the Law Relating to Fraud as it Previously Existed in this Jurisdiction.

Prior to the Opinion filed herein, the judicially settled law of the State of Hawaii, as it related to actions for money damages based on fraud or misrepresentation required that the Plaintiff must show by substantial evidence, more than a mere scintilla, that the events complained of were the sole variant as the cause of the financial loss which was suffered (Rainbow Island Productions, Inc. vs. Leong Agency, 44 Haw. 134).

There was not a scintilla of evidence in the case to show any causal connection between the alleged misrepresentations and the default which led to the foreclosure action.

The Opinion of September 9, 1971 either overlooks or repudiates this principle of law, which was fully briefed on appeal, although in Ellis vs. Crockett, 51 Haw. 45, at p. 52, this Court cited Toho Bussan Karsha, Ltd. vs.

American President Lines, Ltd., 265 F. 2d 418, which specifically holds that a case should be dismissed where the Plaintiff has not completed its burden of proof.

The Opinion impermissibly assumes a causal connection. This same Court refused to indulge in such an assumption in Ellis vs. Crockett, where it stated (51 Haw. p. 52):

> "If there are any special damages, they must be specifically stated pursuant to Rule 9(g). While the causal connection between damages and deceit need not be alleged with as great precision as might be possible or desirable, the complaint, at a minimum must adequately notify both appellee, and the court as to the nature of the claimed damages."

Mitchell vs. Branch & Hardy, 45 Haw. 128, is perhaps the outstanding authority in Hawaii on causal connection as required in the law of negligence. It can be easily paraphrased to meet the requirements in fraud: (1) there must be a causal connection between the alleged misrepre-

sentation and the damages alleged; (2) the mere co-existence of misrepresentation and loss, or the existence of the misrepresentation before the loss is not in itself sufficient to establish this causal connection; (3) the loss must be the result of, or flow from the misrepresentation before the Defendant is liable.

The fact that the project, as built, contained all and more than the plans originally called for completely negates any causal connection between the alleged misrepresentations and the foreclosure.

C. The Opinion and the Law Relating to Agency.

In Ellis vs. Crockett, 51 Haw. 45 at 54, this Court held:

> "...As to Crockett, who it is admitted by the plaintiffs in their complaint was acting as agent for the Haradas throughout all of the transactions in this case, we hold that he could not be sued independently if a suit against his principal is now barred..."

In the foreclosure proceeding, Civil No. 636, Fifth Circuit, State Savings entered an "Order Confirming Sale" setting forth the following figures:

Loan principal	$ 856,449.00
Accrued interest on same	$ 84,099.88
"Loan expenses"	$ 61,358.48
Interest on same	$ 984.91
Mechanic's liens	$ 28,506.70
Receiver's salary	$ 4,500.00
Commissioner's fee	$ 15,500.00
Total:	$1,051,398.97
Purchase price	$ 913,000.00
"Deficiency":	$ 138,398.97

This same "order Confirming Sale" was the sole and only evidence offered in the case on appeal to show damages. An analysis of the above figures shows that the $61,358.48 "Loan Expenses" included a $18,200 cash advance by State Savings to the Receiver prior to the foreclosure sale. State Savings paid $92,000 cash on the purchase price. This was its capital investment in the purchase made at the foreclosure sale.

The capital investment was disbursed as follows:

"Loan Expense" ($61,358.48 - $18,200.00)	$43,158.48
Mechanic's Liens	$28,506.70
Receiver's Salary	$ 4,500.00
Commissioner's Fee	$15,500.00
	$91,665.18

Rounded to $92,000.00, the amount of cash paid into Court by State Savings & Loan.

The bid price was $913,000.00. Thus, State Savings paid itself $821,334.82 on account of the mortgage loan, leaving a principal balance owed on the mortgage loan in the amount of $35,114.18. State Savings had retained $34,280.00 as a discount at the time of the mortgage loan, so that difference is now reduced to $834.18.

In bidding $913,000.00, State Savings in Civil No. 636, chose to forego this $834.18 as well as the $18,200.00 for cash advanced, or $19,034.18 out of pocket; together with accrued

interest of $84,099.88 on the mortgage loan and $984.91 interest loan expenses, and the initial discount of $34,280.00.

Recapitulating the "deficiency", as evidenced by the "Order Confirming Sale" in Civil No. 636, the facts indicate the following:

Out of Pocket "loss" recouped on resale	$ 834.18	
	$18,200.00	
	$19,034.18	$19,034.18
Accrued Income, converted to capital gain on resale:	$ 84,099.88	
	$ 984.91	
	$ 34,280.00	
	$119,364.79	$119,364.79
		$138,398.97

This recapitulation conclusively demonstrates that the mechanic's liens were no part of the "deficiency".

The mechanic's liens, having been discharged by payment in full from the proceeds of the sale of the assets of Kauaian Development, Appellants' principal, no further claim could

arise thereon against said principal or its agents. (See Ellis vs. Crockett, quoted supra).

Any deficiency judgment for the $138,398.97 was required to be taken against the mortgagor in Civil No. 636. Appellants were not individually parties to the contract. The Opinion seeks to make them individual endorsers of the mortgage note as punishment for their alleged misrepresentations. But even if this Court could modify and rewrite the mortgage instruments to hold Appellants liable, it would be for the debt of their principal, who has been discharged by State Savings. Therefore, if the law of agency set forth in Ellis vs. Crockett, is the law of Hawaii, and not a random application, then the actions herein against Appellants were barred.

It is interesting to note that in Ellis vs. Crockett, the above principle was applied against Mr. Corey's clients, Mr. Corey is

entitled to have it apply, now, against his adversaries.

To do less denies Appellants Corey and Kimbrough the equal protection of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

D. The Opinion and the Law Relating to Res Judicata.

State Savings and Loan alleged in its complaint (1) that Kauaian Development Co., Inc. defaulted on its mortgage; (2) that a direct and proximate result of the fraudulent misrepresentations the plaintiff suffered damages as of this date of $138,398.97. On the date of the filing of the complaint herein (September 15, 1966), Civil No. 636, was still pending in the Fifth Circuit, and the Order Confirming the sale to State Savings and Loan, which Plaintiff used to establish its damages, was not entered until

Thus, the Opinion does not rely on the facts of the case when it states: "The present claim could not have been 'properly litigated' as that term is used in the Ellis case, at the time of the mortgage foreclosure action, because at that time it was not known whether State Savings would suffer any damages. The damages were capable of being determined only after the mortgage was foreclosed and the property sold at a loss to the mortgagee, State Savings."

If the Court's Opinion permissibly assumes that the alleged misrepresentations as to the cost of construction were the producing cause of the foreclosure action, and if it permissibly assumes that the paper "deficiency" on the mortgage note constitutes a loss to State Savings, then the issue of misrepresentation belonged, as an alternate claim, in the foreclosure action.

The second suit was barred.

As the Opinion filed herein states:

> "'[t]he judgment of a court of Competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation, not only of the issues which were actually litigated in the first action, but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided.' In Re Bishop Estate, 36 Haw. 403, 416 (1943)."

To say that the damages could not be ascertained until after the foreclosure was completed, as the rationale for saying that this particular grounds of claim could not be litigated in the foreclosure action, requires the Court to also say that a claim for a deficiency judgment against Kauaian Development Company, Inc., did not lie in the foreclosure action, because the amount of the deficiency could not be determined until the foreclosure sale was completed.

Rule 18(b) of the Hawaii Rules of Civil

Procedure, in conjunction with Rule 2, specifically provides for joinder, where damages cannot be determined until after the first claim is decided:

> "... where personal jurisdiction is obtained over a defendant, the plaintiff must in that action secure any deficiency judgment to which he is entitled, and not seek it in a second action."
>
> Moore's Federal Practice, Vol. 3A, Sec. 18.09, p. 2031.

Appellants did not mistake the theory of res judicata pronounced in Ellis vs. Crockett. At 52 Haw. p. 53, this Court specifically held that since damages growing out of an action for fraud or deceit are capable of being ascertained by calculation, the action was required to be filed as a counterclaim in the foreclosure action.

It is respectfully submitted that if Ellis could have properly litigated his claim for deceit in the foreclosre action against his property,

then State Savings and Loan could have properly litigated their claim for deceit in Civil No. 636, Fifth Circuit Court.

E. The Effect of the Opinion Upon Appellants' Constitutional Rights Under the Fourteenth Amendment to the Constitution of the United States.

The effect of the Opinion herein is to surcharge the Appellants with State Savings' paper loss on a mortgage foreclosure, without a basis in the record to show that (a) State Savings suffered any loss, on account of the alleged misrepresentations or for any other reason; or (b) that the discounted contract between Better Built Hawaii and Kauaian Development Company was causally connected with the mortgagor's default.

Due process of law forbids such surcharges or punishments. The guarantees of the Fourteenth Amendment prohibit the taking of one's property and giving it to another, contrary to

settled usages and modes of procedure, 16 Am. Jur. 2nd, Constitutional Law, Sec. 544, p. 935.

"...All courts, even the highest, are more or less limited in their jurisdiction... Though the court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by law..."

Windsor vs. McVeigh, 93 U.S. 274, 282.

"...Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one adjudged belongs; second, the proper parties must be present; and third, the point decided must be, in substance and effect, within the issues. That a court cannot go out of its appointed sphere, and that an action is void with respect to strangers to its proceedings, are propositions established by a multitude of authorities... A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard."

Reynolds vs. Stockton, 140 U.S. 254, 268.

See also Brinkerhoff-Faris Co. vs. Hill, 281 U.S. 673, 677-678, 680-681; Owenby vs. Morgan, 256 U. S. 94, 111; and Frank vs. Mangrum, 237 U.S. 309, 326.

> "Equal protection of the law in its constitutional sense implies that all litigants similarly situated may appeal to the courts for relief under like conditions and without discrimination."
>
> Republic Pictures Corp. vs. Kappler, 151 F.2d 543, 162 ALR 228, affirmed 66 S.Ct. 523, 327 U.S. 757, 90 L. Ed. 991.

Judicial action in private disputes is a form of state action required for application of the Fourteenth Amendment prohibiting state from abridging the privileges and immunities of citizens or denying equal protection of its laws to any person. Hosey vs. Club Van Cortlandt, 299 F. Supp. 501, citing Shelley vs. Kraemer, 334 U.S. 1; 68 S.Ct. 836; 92 L.Ed. 1161, Barrows vs. Jackson, 346 U. S. 249, 73 S.Ct. 1031, 97

L. Ed. 1586 and New York Times vs. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686.

III.

The Court's Opinion, in Part VIII Thereof, Exceeds Its Jurisdiction, Goes Beyond the Scope of the Issues Submitted to it for Decision, and Violates Rule 16 of the Supreme Court, and the Fourteenth Amendment to the Constitution of the United States.

Heretofore, it has been the law of Hawaii that disciplinary action as to members of the Bar is to be had under Rule 16 of the Rules of the Supreme Court.

> "If the commissioners find the attorney guilty of unprofessional conduct, he has a right to contest the finding by filing exceptions to the report in this court... The power to regulate... disciplining of attorneys is judicial in nature and inherent in the courts ...Subject to the limitation that the essential elements of notice and opportunity to be heard must be preserved, the court may prescribe such procedure in disciplinary proceedings that it deems appropriate."
>
> In Re Trask, 46 Haw. 404, 415 (emphasis supplied).

The Trask case further enunciated as a

principal of law that:

> 'Civil liability is not determinable and has no effect in disciplinary proceedings.'

46 Haw. at p. 414.

Section VIII of the Opinion filed herein violates the fundamental rights of Appellant Corey to due process of law, in connection with his practice of law. It impugns his integrity as an attorney, and publicly holds him out as being of bad repute professionally.

Further the said portion of the Opinion contains a constitutionally impermissible prejudgment of the complaint now pending against him under Rule 16, filed by J. Ralph Brown, the principal officer of State Savings and Loan (note also that a complaint was filed by James Campbell, attorney for State Savings and Loan).

At stark variance with Section VIII of the Opinion is the manner in which the Opinion deals

with the conduct of J. Ralph Brown and James Campbell:

> "There was presented at trial conflicting evidence as to what point in time State Savings learned of the double contracting. Testimony was given indicating that State Savings' representative may have learned about the lower construction contract during his counsel's preparation for the foreclosure action." (Opinion, p. 7) (Emphasis supplied).

What is characterized as "conflicting evidence"?

The Amended Complaint, signed by James S. Campbell alleged "That until that date ('in the month of February 1966') plaintiff had not known that the construction contract was for any lesser amount than $761,000.00..."

At R. 147 appears the Affidavit of J. Ralph Brown in which he states under oath "that affiant did not know and had never been told nor informed that the contract was for any lesser sum and after State Savings and Loan Association had

rested its case in the mortgage foreclosure proceeding, he ascertained for the first time... that the real construction contract was for $600,000 plus $60,000 worth of apartments."

The conflicting evidence is in the Record of the case, as supplemented by the Record in Fifth Circuit, Civil No. 636:

(1) The "Answer, Cross-Claim and Summons" filed by Better Built, and receipt of copy signed by James S. Campbell on August 27, 1965 (R. 636, file 1, pp. 66-51).

(2) The Motion to File Amended Answer and Counter-Claim to Cross Claim by Better Built, and receipt of copy signed by James S. Campbell on October 8, 1965 (R. 636, file 1, pp. 200-184).

The conflicting evidence is Mr. Brown's testimony:

"Q. Prior to the time when trial com-

menced in January 1966, did your counsel call your attention to the fact he had received these documents? (The $600,000 contract, Exhibit 15, and its modification, Exhibit 16).

"A. I think that perhaps during some research that he made in preparing the case for trial that he uncovered some of the information about the double contracting and that it was mentioned to me by him, but I don't remember specifically the details of it."

(TR. 245)

Is this Court, in its Opinion, to raise "serious questions of impropriety" in reference to one attorney's business transactions, while at the same time it ignores Rule 11 of the Hawaii Rules of Civil Procedure with respect to adverse counsel?

In Section VIII of the Opinion, the Court delivered its Opinion based on its subjective moral reactions on a question not properly before it. No evidence on this issue was taken pursuant to Rule 16 of the Court's own rules. The Court

has thus committed error in transcending its own jurisdiction, as well as in transcending due process and the equal protection of the laws guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

In addition to the Petition for Rehearing, Appellant Ralph E. Corey respectfully moves that Part VIII of the Opinion be stricken.

DATED: Honolulu, Hawaii, this 30th day of September, 1971.

Respectfully submitted:

HELEN B. RYAN
Suite 207, 1136 Union Mall
Honolulu, Hawaii 96813

Attorney for Ralph E. Corey
and Robert M. Kimbrough.

FILED
SEP 30 3 59 PM 1971
Clement J. H. Chun
CLERK SUPREME COURT

APPENDIX D

PER CURIAM OPINION

STATE SAVINGS & LOAN ASSOCIATION, Plaintiff-Appellant on Count I, Appellee and Cross-Appellant on Count II, *v.* RALPH E. COREY and ROBERT M. KIMBROUGH, Defendants-Appellees on Count I, Appellants and Cross-Appellees on Count II, and WALLACE C. S. YOUNG, Defendant-Appellee on Count I Appellant on the Cross-Claim in Count I

and

RALPH E. COREY and ROBERT M. KIMBROUGH Third-Party Plaintiffs, *v.* BETTER BUILT HAWAII, LTD., Third-Party Defendant

No. 5021

PETITION FOR REHEARING AND MOTION TO AMEND OPINION BY STRIKING

October 5, 1971

RICHARDSON, C.J., ABE AND KOBAYASHI, JJ., AND CIRCUIT JUDGE HAWKINS IN PLACE OF MARUMOTO, J., DISQUALIFIED, AND CIRCUIT JUDGE M. DOI IN PLACE OF LEVINSON, J., DISQUALIFIED

Per Curiam. The petition for rehearing and motion to amend opinion by striking are without merit and denied without argument.

Helen B. Ryan (*Ryan & Ryan* of counsel) Attorney for Ralph E. Corey and Robert M. Kimbrough, for the petition.

APPENDIX E

JUDGMENT ON APPEAL

Pursuant to the opinion of the Supreme Court of the State of Hawaii filed September 9, 1971, this cause is remanded to the lower court with the following directions:

> "The verdict of the jury as to all counts is reinstated and the order of the trial court for a new trial on the issue of damages is reversed. Remand for entry of judgment consistent with this opinion."

DATED: Honolulu, Hawaii, October 22, 1971.

BY THE COURT:

/s/ Clement J. H. Chun
Clerk

APPROVED BY THE COURT:

/s/ Bert T. Kobayashi
Bert T. Kobayashi
Associate Justice

FILED
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Clement J. H. Chun
CLERK SUPREME COURT

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Supreme Court, U. S.
FILED
APR 14 1972
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1971

No. 71-1196

RALPH E. COREY and ROBERT M. KIMBROUGH, Petitioners

v.

STATE SAVINGS & LOAN ASSOCIATION, WALLACE C. S. YOUNG, and BETTER BUILT HAWAII, LTD., Respondents.

BRIEF IN OPPOSITION TO GRANTING OF PETITION FOR CERTIORARI

WILLIAM M. SWOPE
Counsel for Respondent
State Savings & Loan Association
165 South King Street
16th Floor
Honolulu, Hawaii 96813

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CITATIONS

Cases:

Central Land Company v. Laidley, 159 U.S. 103, 40 L.Ed. 91, 16 S.Ct. 80 (1895)

Ellis v. Crockett, 51 Haw. 45 (1969)

Loeber v. Schroeder, 149 U.S. 580, 37 L.Ed. 856, 13 S.Ct. 934 (1893)

McCorquodale v. Texas, 211 U.S. 432, 53 L.Ed. 269, 29 S. Ct. 146 (1908)

Morton v. Dardanelle Special School District, 121 F.2d 423 (8th Cir. 1941), cert. den. 314 U.S. 655, 86 L.Ed. 525, 62 S.Ct. 106, reh. den. 314 U.S. 711, 713, 86 L.Ed 567, 568, 62 S.Ct. 178, 358

Pim v. St. Louis, 165 U.S. 273, 41 L.Ed. 714, 17 S.Ct. 322 (1897)

Tracy v. Ginzberg, 205 U.S. 170, 51 L.Ed. 755, 27 S.Ct. 461 (1907)

Wood v. Conneaut Lake Park, 386 F.2d 121 (3rd Cir. 1967), cert. den. 391 U.S. 907, 20 L.Ed.2d 422, 88 S.Ct. 1660

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1971

RALPH E. COREY and
ROBERT M. KIMBROUGH,
Petitioners,

vs.

STATE SAVINGS & LOAN
ASSOCIATION, WALLACE
C. S. YOUNG, and
BETTER BUILT HAWAII,
LTD.,
Respondents.

No. 71-.....

CITATIONS TO OPINIONS BELOW

The Opinion of the Hawaii Supreme Court is reported at 53 Haw. 132. That court's per curiunr denial of the petition for rehearing is reported at 53 Haw. 177.

JURISDICTION

The jurisdiction of this Court is invoked by petitioners under Title 28, §1257(3), United States Code, with respect to title, rights, privileges, and immunities set up and claimed under the Constitution of the United States.

Respondents question this jurisdiction in that no federal question had been raised by petitioners until their petition to the Hawaii Supreme Court for a rehearing and that court has not decided any federal question.

QUESTIONS PRESENTED

The Petition for Certiorari states that the decision below presents three questions for review. Respondents feel that the following questions are presented:

I

Does the judgment of a State court of last resort violate the Fourteenth Amendment to the Constitution of the United States where it reverses a trial court and reinstates a jury verdict based on conflicting evidence where there is substantial evidence to support the jury's finding?

II

Is the Fourteenth Amendment to the Constitution of the United States violated by the mere fact that a person is unsuccessful in a matter involving property where there has been a full hearing, or opportunity for hearing, and where that person has been fully heard in the regular course of judicial proceedings?

III

Should the Supreme Court of the United States issue a writ of certiorari to review the judgment of the Supreme Court of Hawaii, when that State court did not decide a Federal question, and none was necessary for the determination of the case?

IV

Was the Fourteenth Amendment to the Constitution of the United States violated when the Supreme Court of Hawaii, by way of dicta, exercised its inherent duty to support the ethical standards of the Bar when it attempted to impress upon one of its members his duty to keep his conduct beyond reproach?

STATEMENT OF THE CASE

PART I

On November 15, 1963, Petitioners Kimbrough and Corey went to the offices of Respondant, State Savings & Loan Association, in an effort to secure a construction mortgage loan commitment for the Kauaian Development Co., Inc. (hereinafter called "Development Company."), to erect a hotel condominium complex to be known as the Hyatt House on the island of Kauai. Mr. Kimbrough and Mr. Corey were each 25% shareholders and the President and Vice President-General Counsel, respectively, of the Development Company. Messrs. Kimbrough and Corey informed Mr. Brown, a Vice President of State Savings, that they were anxious to secure a loan commitment before the end of the year. Mr. Brown informed the gentlemen that he lacked authority to make a loan of the magnitude requested and that such a commitment would have to be approved by the Board of Directors of State Savings (a Utah corporation) in Salt Lake City. He informed them that; before the Board of Directors would pass on the application, they would need all of the relevant data relating to the cost of land, cost of construction, financial information, etc., showing the stability of the Development Company, as well as all other pertinent information regarding the feasibility of the project. Many conferences followed in which extensive documentation was furnished Mr. Brown by Messrs. Kimbrough and Corey regarding many phases of the project, and these were forwarded to Salt Lake City.

On or about December 9, 1963, Mr. Corey submitted to Mr. Brown a financial statement of the Development Company which Mr. Corey had personally signed as Vice President, revealing that the construction cost was $761,500.00, and in addition thereto there were other items

of construction to be paid for by the Development Company.

By December 20, 1963, no appraisal had been made of the project to be constructed and in a letter to the Board of Directors of State Savings Mr. Brown wrote:

> "The amount of the loan is left indefinite since it is based on 65% of an appraisal which we hope to get in about ten days . . ."

Mr. Brown testified that he had hoped for approval of the loan and on December 23rd had prepared a loan commitment, which he held pending the anticipated approval of his Board of Directors. The proposed commitment which he then prepared reads in part:

> "We will make a mortgage for the construction and development of this project in an amount not to exceed sixty-five per cent (65%) of the fair appraised value of the real property, including the land, seventy-seven (77) apartments and other facilities. This fair appraised value will be based on an appraisal to be made by an M.A.I. appraiser approved by us."

On December 24th, Mr. Brown received a telegram from his Board of Directors approving the loan on the terms and conditions set forth in the telegram, which terms and conditions differed materially from the letter he had prepared and had anticipated sending. Insofar as the telegram is pertinent, it provides as follows:

> "BOARD STILL PREFERS 50% PORTION OF LOAN TO KAUAIAN HYATT HOUSE BUT APPROVED 100% ON FOLLOWING TERMS AND CONDITIONS *LOAN NOT TO EXCEED 65% OF M.A.I. APPRAISAL OR 65% OF M.A.I. APPRAISAL OF LAND PLUS CONSTRUCTION AND RELATED COSTS WHICHEVER IS LESS* STOP . . ." (emphasis added)

Messrs. Corey and Kimbrough came to the office of State Savings on Christmas Eve after it had closed for the day and, rather than retype the commitment letter, Mr. Brown relates that Mr. Corey suggested to him that the letter be amended in ink to conform to the conditions of the telegram and that the telegram be attached to the letter and made a part thereof. Accordingly, Mr. Corey amended the letter with an ink pen and executed the letter with the following notations, which were also initialed by Mr. Corey:

> "Subject to conditions in attached cable.
> Accepted December 24, 1963, Kauaian
> Development Co., Inc. by Ralph E. Corey,
> Its Vice President."

Sometime between December 24, 1963 and January 15, 1964, Mr. Brown testified that he received from Mr. Corey or Mr. Kimbrough a construction cost breakdown, which was on the typed heading of the contractor, Better Built Hawaii, Ltd., hereinafter referred to as "Better Built". This construction cost breakdown contained an itemized breakdown of 36 construction items. Thirty-one of these items are in a column designated "Contractor's Cost" and total $761,500.00. The remaining five construction items, including the balance due on the architect's contract, total $211,855.00 and are listed in a column designated "Developers' Cost". The total cost of construction as revealed by the contractor's cost breakdown is $973,355, which is the aggregate of the columns entitled "Subcontractors and Materials: Contractor's Cost and Developers' Cost".

At approximately the same time that Mr. Brown received the contractor's cost breakdown from Mr. Corey or Mr. Kimbrough, he also received from the developers a Performance Bond issued by the contractor, Better

Built, as principal, and First Insurance Company of Hawaii, Ltd., as surety. The bond runs in favor of the developers and is in the amount of $761,500.00. It covers a construction contract between the contractor and the developers dated October 28, 1963, for the Kauaian Hyatt House for the amount of $761,500.00. A Payment Bond for 50% of the construction contract ($380,750.00) with the same principal and surety in favor of the developers was also delivered to Mr. Brown by the developers.

At approximately the same time, the developers delivered to Mr. Brown minutes of a special meeting of the Board of Directors of the Kauaian Development Company held on January 6, 1964, which minutes reveal Messrs. Kimbrough and Corey to be present. The minutes insofar as they are pertinent read as follows:

> "The following resolutions were unanimously adopted:
>
> "(1) RESOLVED, that KAUAIAN DEVELOPMENT COMPANY, INC. accept the loan offer and commitment for the financing of the KAUAIAN HYATT HOUSE at Poipu Beach on the Island of Kauai, made by STATE SAVINGS & LOAN ASSOCIATION of Honolulu by letter and attached cable on December 23, 1963, in accordance with the expressed terms of said letter commitment *with attached cable.*" (emphasis added)

As the parties moved toward the closing of the construction loan, Mr. Brown wrote to Mr. Kimbrough on January 15, 1964 as follows:

> "We are in the process of preparing the mortgage documents for a loan in the amount of $857,000.00 for the construction of your Kauaian Hyatt House development. These papers should be ready for signature on January 20.

"It might be appropriate at this time to spell out specifically what documents we must have for our files in order to complete this mortgage agreement and to record the papers. We need, for our files, a copy of the complete plans and specifications for the construction. We also need a copy of the contract between you and the builder. If the contract does not specifically spell out the arrangements under which the payments are to be made we would like a separate letter of agreement instructing us as to how these payments are to be made and under what kind of authorization. We should also have a copy of all of the other related contracts for the sewage disposal plant, the rock wall and grading work, the landscaping, the architect's agreement, the appliances and the carpeting, if these are on separate contracts. All of these documents are needed in order to justify the loan of $857,000.00 in accordance with the original commitment by our Board. If payments have been made on some of these obligations then evidence of such payment should be in our files. *The Loan Settlement Statement is going to have to indicate where and how the money is to be provided for meeting all of these obligations for the ultimate completion of all of the project which is subject to our mortgage.*" (emphasis added)

Mr. Brown testified that he arrived at the amount of the loan by following the terms of the loan commitment as fully set forth in the telegram. He had received the appraisal of January 13, 1964 at about this time. The figures in the appraisal for site preparation and the sewage treatment plant were identical or virtually identical to the figures for these items contained in the construction cost breakdown, which he had reviewed, and the architect's fee and other items substantiated the construc-

tion cost breakdown which had been delivered to him by Mr. Corey. Mr. Brown testified that he had verified the construction cost breakdown with the figures set forth in the appraisal.

The total cost of construction as revealed in the contractor's cost estimate, which was furnished to Mr. Brown by Mr. Corey, is $973,355.00. By following the terms of the loan commitment as set forth in the telegram,[1] the mortgage loan figure of $857,000.00 is arrived at as follows:

Appraised value of land		$ 345,000.00
Cost of construction per Contractor's Cost breakdown		
(a) Contractor's Cost	$761,500.00	
(b) Developers' Cost	211,855.00	973,355.00
		$1,318,355.00

65% of $1,318,355 is $856,930.75, which is rounded off to $857,000.00.

On or about the same time, Mr. Brown testified that he asked Messrs. Kimbrough and Corey for an executed copy of the construction contract. The contract which was delivered is between the Development Company, as owner, and Better Built, as contractor, in the amount of $761,500.00 and dated October 28, 1963. Mr. Corey had on more than one occasion represented to Mr. Brown that the construction contract was $761,500.00. Mr. Kimbrough also made these representations to Mr. Brown. Mr. Brown relied on the construction contract of $761,500.00.

[1] ". . . LOAN NOT TO EXCEED 65% of M.A.I. APPRAISAL OR 65% OF M.A.I. APPRAISAL OF LAND PLUS CONSTRUCTION AND RELATED COSTS WHICHEVER IS LESS STOP" (Exhibit 6)

Mr. Brown also testified that about this time he received a letter which is dated January 16, 1964 from Mr. Kimbrough and which reads as follows:

> "With reference to your letter of January 15, 1964, requesting specifically how the escrow be paid to the contractor, Better Built Hawaii, Ltd., and to Kauaian Development Co., Inc., the following applies:
>
> "The contractor, Better Built Hawaii, Ltd., will prepare a request for specific amounts of withdrawals monthly to Kauaian Development Co., Inc. Kauaian Development Co., Inc. will, at that time, review the amount of construction completed or the amount of materials purchased, and, if satisfactory, approve the request and hand carry the same to State Savings and Loan Association. The authorized signature for approval by Kauaian Development Co., Inc. will be that of Robert M. Kimbrough, President.
>
> "All checks issued by State Savings and Loan Association out of their escrow shall be made payable to Kauaian Development Co., Inc."

Mr. Brown testified that, in reliance on all of the foregoing documents and the verbal representations of Messrs. Kimbrough and Corey, he prepared a Loan Settlement. The statement revealed that the loan proceeds available for disbursement from the loan of $857,000.00 after the deduction of applicable loan expenses and charges would be $821,189.50. The developers had informed Mr. Brown that construction had already started and that several thousand dollars had already been paid to the contractor. The Loan Settlement Statement revealed a loan balance of $813,925.00 while the cost of the work yet to be performed was $867,675.00. Thus, the total anticipated cost of construction exceeded the loan proceeds, leaving a cash deficiency of $46,485.00.

Mr. Brown testified he had informed Messrs. Kimbrough, Corey and Young that, if there were a cash deficiency, they would have to deposit with the Association in cash such deficiency as existed in order to assure that sufficient funds would be available to pay the expenses of construction. The developers had assured Mr. Brown that they were good for the money and that they would guarantee the payment of the shortage to assure completion of the project. In fact, in Mr. Corey's presence, they represented to Mr. Brown that Mr. Corey alone was worth $300,000.00. Mr. Brown knew that Mr. Young, the Secretary-Treasurer of Kauaian Development, had several businesses around town and was under the impression that he had a rather substantial net worth.

In reliance upon these statements and the representations of Messrs. Kimbrough, Corey and Young, Mr. Brown prepared as one of the closing documents a written undertaking for these gentlemen to execute which reads in its entirety as follows:

"January 17, 1964

"State Savings and Loan Association
1001 Bishop Street
Honolulu, Hawaii 96813

"Gentlemen:

"This letter will confirm our oral agreement regarding the mortgage funds and the construction funds for the Kauaian Hyatt House.

"The construction mortgage loan in the amount of $857,000.00 was dated January 17, 1964 and signed on this date on behalf of the Kauaian Development Company, Inc. as the mortgagor and State Savings and Loan as the mortgagee. On the Loan Settlement Statement, in connection with this loan, there are listed the expenditures to be made by the loan com-

pany in order to complete the project. This statement shows an additional amount to be received from the development company to provide for all loan disbursements in the amount of $46,485.50. Although the mortgage loan is made to the corporation, of which the undersigned are officers, it is hereby agreed that the undersigned officers pledge their personal liability for the above amount of money, or any other amount of money that may be necessary, to complete the proposed Hyatt House development on the island of Kauai. We guarantee that this money will be available for the payment of expenses to complete this project as originally proposed in the mortgaging agreements.

"Very truly yours,
/s/Robert M. Kimbrough, Pres.
/s/Wallace C. S. Young
/s/Ralph E. Corey

The written undertaking was reviewed and executed by the principals without comment and was one of the documents which Mr. Brown relied on when he made the loan.

The loan was closed on January 17, 1964, and the mortgage for $857,000.00 was placed of record on that day. The loan proceeds were then available for disbursement. In processing the loan, the progress payments were made to Kauaian Development Company pursuant to the developers' request of January 16, 1964. By letter to the contractor, Better Built Hawaii, Ltd., dated March 17, 1964, Mr. Brown sought clarification that the contractor was being paid. Emil Offer, the President of Better Built, telephoned Mr. Brown and satisfied him that the contractor was being paid.

A letter was written on the same date to the architect

to assure that he was being paid his fee of $40,000.00 as originally represented by Mr. Corey. By letters dated March 31, 1964 and April 7, 1964, this fee was confirmed and explained, showing the fee to be $37,500.00 (5% of $750,000.00 payable 80% upon completion of the construction contract negotiations, plus $2,500.00 for some plan revisions).

Each of the various requests for progress payments was executed by Emil A. Offer, President of Better Built, and Robert M. Kimbrough on behalf of the Development Company, and all loan disbursements were made pursuant to these payment requests. The ninth payment request dated August 25, 1964 against the construction contract was for $30,000.00 and it was noted to be the balance due to the contractor. This request was executed by both Mr. Kimbrough and Mr. Offer. All of the progress payments had been issued by check to the developers and the final payment of the loan proceeds then remaining, which amounted to $17,599.50, was paid directly to the Development Company on certificate of Mr. Kimbrough and Mr. Young on September 14, 1964.

PART II

A. Facts Surrounding the Conspiracy Agreement.

On or before October 28, 1963, more than two weeks before State Savings was approached, the contractor prepared an actual cost breakdown estimate, including profit and overhead necessary to construct the work set forth in the plans and specifications for the project as submitted to it by the developers. The total estimated cost was $701,500.00. Emil Offer, the President of the contracting company, testified that on October 28, 1963, Better Built entered into a construction contract with the developers to perform all such work for $701,500.00. Mr.

Offer testified that, thereafter, he secured a performance and payment bond to bond this construction contract.

Thereafter, the contractor was able to effect some savings, thereby reducing the contract price, and also agreed to take his anticipated profit of $60,000.00 in apartments. On November 8, 1963, the construction contract of October 28, 1963 was, therefor, cancelled and the parties entered into a new construction contract whereby Better Built was to do ". . . all contractual work . . ." for $600,000.00 in cash, plus $60,000.00 worth of apartments in the project when the project was completed. This contract shall sometimes be referred to herein as the "$600,000.00 contract". Mr. Offer testified that included in this contract was the sewage treatment plant, landscaping, fill, etc., which are the same items that are listed separately as Developers' Costs in the documents submitted in support of the loan application. On November 8, 1963, Mr. Offer executed this new contract for the contractor, and Mr. Kimbrough executed it for the developers. Mr. Corey read this contract when it was signed.

Seven days later, Mr. Kimbrough and Mr. Corey went to the offices of State Savings for the first time to apply for a mortgage loan. One of the first documents furnished to State Savings was a financial statement dated December 9, 1963 and signed by Ralph E. Corey, Vice President, which reads in part:

"Construction (completely bonded) $761,500;
Site Improvement (rock walls,
fill, pier landscaping, grading,
signs and out-door lights) ..... $ 60,000"

Mr. Offer testified that sometime in December of 1963, at the request of Mr. Kimbrough and Mr. Corey, and in their presence in Mr. Corey's law office he effected a construction contract for $761,500.00. The con-

tract is dated October 28, 1963, and the manner in which the contract was effected was by taking the old October 28, 1963 contract for $701,500.00, and changing page 2 by withdrawing the old page 2, which had a contract figure of $701,500.00, and inserting in lieu thereof a new page 2, in all respects identical except that the contract amount is $761,500.00. The new page 2 was initialed by Mr. Offer and Mr. Kimbrough. Mr. Offer testified that this new contract had no purpose other than financing purposes. Mr. Offer testified that, at the request of Mr. Kimbrough and Mr. Corey, he made application to the First Insurance Company of Hawaii, Ltd. to reissure the performance and payment bonds in the amount of $761,500.00, and the new bonds reflecting the contract price of $761,500.00 were reissued to replace the old bonds with a contract price of $701,500.00. Mr. Offer testified that he delivered the bonds to the developers and they used them for their purposes. These were the particular bonds that were delivered to Mr. Brown at State Savings. The penal amount of the performance bond delivered to State Savings is $761,500.00, the amount reflected in Mr. Corey's financial statement of December 9, 1963.

Neither Mr. Kimbrough nor Mr. Corey or Mr. Young ever told Mr. Brown of the $600,000.00 construction contract, and had he known the real construction contract was other than the one represented to be $761,500.00, he would not have made the loan.

Nothing else happened until December 24th when the loan commitment with attached cable was issued by State Savings and accepted by Mr. Corey for the developers.

On or about December 31, 1963, Mr. Offer went to Mr. Corey's law offices where Mr. Kimbrough handed to him a letter agreement for execution by him.

The letter agreement, which shall hereinafter be referred to as the "conspiracy agreement", reads in its entirety as follows:

"Honolulu, Hawaii
December 31, 1963

"Better-Built Hawaii, Ltd.
P. O. Box 3527
Honolulu, Hawaii

"*In re:* Contractor's Cost Breakdown Estimate
"*Attention* Mr. Emil A. Offer, President

"Dear Mr. Offer:

"Enclosed herewith is a copy of your corporation's Contractor's Cost Breakdown Estimate.

"It is the mutual understanding and agreement of Better-Built Hawaii, Ltd. and Kauaian Development Company, Inc. that the attached Estimate is made and given by your corporation for financing purposes only, and is not to be interpreted or construed by either party to modify in any way the sole and existing written agreement between them dated November 8, 1963, relating to the total cost and price figure of $600,000 for all contractual work to be performed by your corporation, including rock wall and fill and pier facilities, as well as to other matters.

"It is further understood and agreed by both corporations that the preparation of the Cost Breakdown Estimate attached hereto is necessitated by reason of the new 65% financing and loan commitment obtained by Kauaian Development Company, Inc. from State Savings & Loan Association of Honolulu, said commitment to be based upon an immediate and new appraisal of the entire proposed development by Mr. John Hulten, M.A.I. appraiser.

"It is understood that all withdrawals of funds by

the Contractor from time to time from the loan escrow in accordance with the Estimate attached and the Schedule of Withdrawal to be provided by the lender will be cooperatively and mutually shared and disbursed by and between our two corporations in accordance with the total contractor's cost figure contained in the November 8, 1963 agreement and in direct proportion to moneys and equity due each corporation in the venture.

"BETTER BUILT HAWAII, LTD.,
By/s/ Emil A. Offer
EMIL A. OFFER
Its President

KAUAIAN DEVELOPMENT
COMPANY, INC.,
By/s/ Robert M. Kimbrough
ROBERT M. KIMBROUGH
Its President"

(The underlined portions appear in the original letter.)

At the time that the conspiracy agreement was handed to Mr. Offer in Mr. Corey's offices, Mr. Offer testified that he was handed a contractor's cost estimate. There is typed on the top of this document in capital letters the notation *"NOTE: TO BE USED FOR FINANCING PURPOSES ONLY."* This cost breakdown designates as contractor's cost a total amount of $761,500.00 and in addition lists as developers' cost a total of $211,855.00.

Mr. Offer testified that he had never been involved in a large construction contract before and that he knew that Mr. Corey was an attorney and that Mr. Kimbrough was a financial advisor on construction projects in California, and further testified that in Mr. Kimbrough's presence in the same meeting, Mr. Kimbrough indicated

to him that this type of operation was customary. In fact, ". . . He said it was done all the time". Both Mr. Kimbrough and Mr. Corey testified that they had no duty to the lending institution to reveal the true facts for the matter was private and one between the contractor and developer.

B. Facts Surrounding the Written Understanding.

By January 15, 1964, all of the necessary documents to support the loan had as yet not been delivered to State Savings. By letter that day, Mr. Brown requested these documents. In anticipation of preparing the loan settlement statement, the letter reads: ". . . the loan settlement statement is going to have to indicate where and how the money is to be provided *for meeting all of these obligations for the ultimate completion for all of the project which is the subject to our mortgage.*" (emphasis added)

The documents requested began to come in, including the developers' appraisal. Mr. Brown used various figures in the appraisal to substantiate and verify the contractor's cost breakdown. The financial statement and balance sheet, both of which Mr. Brown relied on in making the loan, had already been delivered. The construction contract for $761,500, together with the performance and payment bonds for this contract, were also delivered to Mr. Brown about this time and he testified that he relied upon them in making the loan. Mr. Brown prepared the loan settlement statement from the information contained in the contractor's cost estimate, and that settlement statement revealed a cash deficiency of $46,485.50. Mr. Brown asked the developers to put the difference up in cash, but Mr. Kimbrough had told him there would be no problem, for Mr. Corey alone was worth $300,000. They indicated that they would prefer

to sign a written undertaking to assure that the money would be available when needed and Mr. Brown prepared such a written undertaking and they signed it. Mr. Brown testified that he relied upon this written undertaking at the time that he made the loan and that it was an essential part of the loan documentation.

C. Disbursement of Loan Proceeds and the Amended Construction Contract.

On January 17, 1964, Mr. Brown closed the mortgage and started disbursing the loan proceeds to the developers. What Mr. Brown did not know are the facts which Mr. Offer testified to five and a half years later. Mr. Offer testified that he prepared the statement for each progress payment and gave it to Mr. Kimbrough, from which they prepared the final one to be submitted to the lender, and then they both signed it and submitted it to State Savings. The money from State Savings was then divided pursuant to the terms of the conspiracy contract. Mr. Offer further testified that when he got Mr. Brown's letter of March 17 making inquiries as to whether or not he was getting paid the amounts requested, that he did in fact telephone Mr. Brown and told him that he was getting paid as requested. Mr. Offer testified that the only consideration Better Built was given for all of the work it did on the Seven Seas Hotel was $600,000 in cash and a deed to three condominium units, which were already subject to a master mortgage in favor of State Savings.

D. Foreclosure of the Mortgage.

The mortgage loan became delinquent and on July 16, 1965, Civil No. 636, *State Savings & Loan Association v. Kauaian Development Company, Inc., et al.*, was docketed in the Fifth Circuit Court of the State of Hawaii. The complaint was amended on October 12, 1965,

after Better Built Hawaii, Ltd. and other mechanics' lien claimants had joined in the action.

The mortgage foreclosure was a suit in equity brought *in rem* to foreclose the master mortgage upon the property. Although Messrs. Kimbrough, Corey and Young did not appear as title holders to any units, they were, nevertheless, cited as defendants because of their letter of February 27, 1965 to the condominium unit owners wherein they alleged that they were apartment owners. The letter reads in part as follows:

> ". . . We have done everything possible to guide this venture into safe waters. We belive we have at last done so. We can do no more. *We are now apartment unit owners on the same basis as everyone else.*" (emphasis added)

Shortly after the mortgage foreclosure suit was instituted, the Kauaian Development Company filed a Chapter X proceeding for reorganization in the Federal District Court for the District of Hawaii. This followed other civil litigation commenced between various parties to determine the real owners of the stock of the Kauaian Development Company, Inc., and the Kauaian Land Company, Inc. These proceedings continued through the Fall of 1965, at which time the persons then in possession of the hotel physically abandoned the hotel after allowing its fire insurance to lapse. Because the hotel was left without a living soul to maintain or protect it, plaintiff on December 3, 1965 petitioned for a receiver and the receiver took over custody of the property on that day. Trial was held on the mortgage foreclosure and thereafter the mechanic's lien claimants presented their respective cases.

The Court ordered that the property be foreclosed and sold to pay the balance due on the mortgage and

two mechanics' liens totaling $28,506.70, which had priority over the mortgage. The receiver was ordered to sell the property at public auction at an upset price in an amount of approximately the amount of the mechanic's liens and the mortgage balance, including the expenses of foreclosure, the receiver's salary and the commissioner's and attorneys' fees. There were no bidders at the first judicial auction and the Judge after proper hearing ordered that the property be sold without an upset price. At the second judicial auction on August 30, 1966, State Savings appeared and bid the total amount of $913,000 for the property, which was $138,200.80 less than the balance due on the mortgage. After the second auction, there was a hearing on a motion by the commissioner to ratify and confirm the report of the commissioner and to approve the sale. The Order confirming sale was entered by the Court on September 28, 1966. The Order recites, ". . . it appeared to the Court that the sale was in all respects regularly and fairly advertised, made and conducted . . ." The Court noted that the balance of the mortgage (being the principal, interest, loan expenses, receiver's salary, commissioner's fee, advertising expenses of $1,219.92 to advertise the two foreclosure sales and mechanics' liens totaling $28,506.70, which the Court found to have priority over the mortgage) amounted to a total of $1,051,200.80. The amount paid by State Savings for the property was $913,000.00, leaving a loss to State Savings of the difference between the two which is $138,200.80, of which $28,506.70 is the amount paid to discharge the mechanics' liens.

On September 15, 1966, this action had been commenced, as Civil No. 19985 in the Circuit Court of the First Circuit, State of Hawaii, against Corey, Kimbrough and Young as defendants. The complaint in two counts was in assumpsit on the first count and in fraud on the

second count. About two weeks later the order confirming sale was entered in the mortgage foreclosure proceeding.

State Savings & Loan Association suffered no monetary loss until the property was actually sold at the foreclosure sale and the sale confirmed. On February 7, 1967, after the order confirming the sale had been entered in the mortgage foreclosure proceeding the full loss was taken on the books of State Savings. After the judicial deed had been delivered to State Savings by the commissioner and recorded in the Bureau of Conveyances, State Savings amended its complaint in this action to set forth its exact loss. This action was duly tried before a jury which returned a verdict on both counts in favor of the plaintiff.

On motions, after the verdict on each count was in, the lower court set aside each verdict.

On appeal, the Hawaii Supreme Court reversed the judgment granted by the trial court and reinstated the jury verdict regarding Count I. In reversing the trial court's granting of judgment notwithstanding the verdict as to Count I, the Hawaii Supreme Court said it was erroneous for the Court to subsititute its judgment for the jury's regarding whether it was the $600,000.00 contract or the $761,500.00 contract which had been made a part of the mortgaging agreements. And since it was the $761,500.00 contract which was represented to State Savings as being the true contract between the developer and the contractor, it was correct for the jury to take it into consideration in determining whether Kimbrough, Corey and Young were personally obligated through a written undertaking to discharge the mechanics' liens.

On Count II the trial court was affirmed in denying defendant's motion for judgment notwithstanding the verdict, but the trial court was reversed on its granting

of a new trial as to the damages on Count II. The Court held that only the amount of the proceeds resulting from the foreclosure sale was relevant to the question of damages. The fact that State Savings itself was the buyer, and the fact that it later resold the property were found to be irrelevant.

On the issue or *res ajudicata*, the Court distinguished the present case from *Ellis v. Crockett*, 51 Haw. 45 (1969). The Court specifically held that since plaintiff's damages were not known at the time of the mortgage foreclosure action, the claim in the instant case could not have been litigated then. Indeed, it was not even known if plaintiff had suffered any damage, and that could be determined only after the mortgage was foreclosed and the property sold at a loss to the mortgagee. Even if State Savings had known about the fraud when the mortgage foreclosure action was brought, the other essential element of fraud, that of having suffered damages, was not then present and did not occur until the trial was over and the property sold at a loss at judicial sale.

ARGUMENTS

I

Over the petitioner's objection, the trial court in this action instructed the jury, in part, that in construing the written undertaking executed by Kimbrough, Corey and Young to State Savings, it should consider the loan settlement statement and all testimony adduced with regard to what the parties intended at the time the document was prepared and executed. The jury returned a special verdict on Count I relating to the written undertaking against Kimbrough, Corey and Young for $28,506.70. On Count II for fraud, the jury found for State Savings and against Kimbrough and Corey for $109,694.00. The trial court, on motion by petitioners, set aside the judgment as to Count I and entered a judgment

notwithstanding the verdict, finding that Better Built had been paid by Kauai Development according to the terms of the $600,000.00 contract. The trial court also ordered a new trial on Count II to determine damages only, stating that it had erred in not admitting evidence relating to a sale of the hotel by State Savings after this suit had been instituted.

The Hawaii Supreme Court reinstated the verdict of the jury on all counts and reversed the order for a new trial. That Court, in so doing, stated (53 Haw. 132, 141-2),

> "The jury had the written guarantee agreement, a copy of what was represented to State Savings as a construction contract, and testimony from all parties involved upon which to base its verdict. It has long been the law of this jurisdiction that verdicts based on conflicting evidence will not be set aside where there is substantial evidence to support a jury's findings. *Ashford v. Thos. Cobb & Son, Ltd.*, 52 Haw. 113, 123, 471 P.2d 530, 536 (1970); *Fernandez v. Hao*, 43 Haw. 335, 336 (1959); *Louis v. Victor*, 27 Haw. 262, 263 (1923). There was sufficient evidence for the jury to find for State Savings on Count I. As such, the judgment granted by the trial court should be reversed as to Count I and the jury verdict reinstated."

In so ruling, the Hawaii Supreme Court in no way impaired the Obligation of Contracts in violation of Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States. *Morton v. Dardanelle Special School District*, 121 F.2d 423, cert. den. 314 U.S. 655, 86 L. Ed. 525, 62 S. Ct. 106, reh. den. 314 U.S. 711, 713, 86 L. Ed. 567, 568, 62 S. Ct. 178, 358; *Central Land Company v. Laidley*, 159 U.S. 103, 40 L. Ed. 91, 16 S. Ct. 80.

II

Petitioners make no claim that they have not had an opportunity to be heard fully concerning the adjudication of the claims which were brought below. Indeed, their only invocation of the jurisdiction of the United States Supreme Court is through the claim that the decision of the Hawaii Supreme Court deprives them of property without due process of law simply because the effect of the decision is to deny them their claim to the property.

However, this Court has held repeatedly that the Fourteenth Amendment does not impair the authority of the States, by their judicial tribunals, and according to the established modes of procedure, to determine finally, for the party before them, controverted questions as to the ownership of property. *Tracy v. Ginzberg*, 205 U.S. 170, 51 L.Ed. 755, 27 S. Ct. 461; *Wood v. Conneaut Lake Park, Inc.*, 386 F. 2d 121, cert. den. 391 U.S. 907, 20 L.Ed.2d 422, 88 S.Ct. 1660. All of the parties in interest were before the State Court and petitioner made full use of all available opportunities for hearing.

III

Petitioner contends that Federal questions were first raised only after the Hawaii Supreme Court had rendered its decision when petitioner requested a re-hearing before that Court. In a per curiam decision, that petition for rehearing and motion to amend the opinion by striking was held to be without merit and denied without argument.

There is no indication that the State Court decision involved a Federal question, that the Court actually passed upon and decided any Federal question, that such a decision of a Federal question was necessary to the determination of the cause, or that such a Federal question

was not frivolous or wholly without merit. *McCorquodale v. Texas*, (1908), 211 U.S. 432, 53 L.Ed. 269, 29 S.Ct. 146.

It has long been established that it is too late to raise a Federal question for the first time in a petition for rehearing in the court of last resort of a State, after that court has pronounced its final decision. *Loeber v. Schroeder*, 149 U.S. 580, 37 L.Ed. 856, 13 S.Ct. 934; *Pim v. St. Louis*, 165 U.S. 273, 41 L.Ed. 714, 17 S.Ct. 322.

IV

The portion of the opinion of the Hawaii Supreme Court entitled "VIII Attorney Corey's Conduct" was dictum. Nowhere is it suggested that the decision in the case turned on the fact that Petitioner Corey was an attorney. The Hawaii Supreme Court was merly admonishing a member of the Bar of the State of Hawaii, and exercising that Court's inherent right to support the ethical standards of the Bar. Petitioner Corey had not been disbarred, suspended, or otherwise prevented from practicing law. Should a charge be made under Rule 16 of the Supreme Court of Hawaii, or should he desire to clairfy the admonition and have his conduct investigated, he then will have ample opportunity to be heard. If there is any formal disciplinary proceeding at a later time, he then will be entitled to a hearing with all the protections of the Fourteenth Amendment.

CONCLUSION

For the reasons set forth above it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

William M. Swope

WILLIAM M. SWOPE
Attorney for State Savings & Loan Association

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1971

No. 71-1196

RALPH E. COREY and
ROBERT M. KIMBROUGH, Petitioners

v.

STATE SAVINGS & LOAN ASSOCIATION,
WALLACE C.S. YOUNG, and BETTER
BUILT HAWAII, LTD., Respondents.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1971

RALPH E. COREY and ROBERT M. KIMBROUGH, Petitioners,	)	
vs.	)	No. 71-1196
STATE SAVINGS & LOAN ASSOCIATION, WALLACE C.S. YOUNG, and BETTER BUILT HAWAII, LTD., Respondents.	)	

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

The petitioners herein respectfully move this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on May 15, 1972, and (2) granting the petition. As grounds for this motion, petitioners state the

following:

> Where the Opinion of a State Court Alternately Repudiates and Then Invokes Estoppel to Prejudicially Serve the Interest of the Respondent Mortgagee in Violation of the Elementary Rule that Estoppel Arising Out of a Prior Judgment is Equally Conclusive on All Parties to the Action, Does This State Action Deprive Petitioners of Their Rights Under the Seventh and Fourteenth Amendments to the Constitution of the United States?

The submissions heretofore made to this Court may not have shown how the State Court violated that ". . . principle of general elementary law that the estoppel of a judgment must be mutual, Railroad Co. v. National Bank, 102 U.S. 14; Keokuk and W. Railroad v. Missouri, 152 U.S. 301; Freeman on Judgments, § 159; Greenleaf on Evidence, 13th ed. vol. 1, § 524." Bigelow v. Old Dominion Copper Co., 225 U.S. 127 (1912).

Or, as expressed in Brooklyn City and N.R. Co. v. Nat'l. Bank of the Republic, 102 U.S. 14,

22 (1880):

> "An estoppel arising out of the judgment of a court of competent jurisdiction is equally conclusive upon all the parties to the action and their privies. It may not be invoked or repudiated at the pleasure of one of them as his intent may happen to require."

The issue was raised in the Honolulu trial court (Civil No. 19985) when the mortgagee sought to introduce into evidence plaintiff's Exhibit 13, a certified copy of the Order Confirming Sale (i.e., the judgment) of the Kauai court (Civil No. 636).

The transcript of Civil No. 19985 reads in the parts pertinent as follows:

> "Mr. Campbell (Attorney for mortgagee): This particular item is res judicata because particular amounts and the expenses were determined by the judge in that court and set down as expenses and approved." (TR. 113.)
>
> "Mr. Campbell: I think all of those issues are res judicata.
>
> "Mrs. Ryan: The whole case is res judicata, Your Honor.
>
> "Mr. Campbell: On those particular issues

there is a collateral estoppel." (TR. 118.)

"Mr. Campbell: My point in introducing this is that this is a certified copy of an Order Confirming the Sale which has already met a finding of facts and law that these items are proper and correct. I don't think I have to prove them. This is a case of collateral estoppel where these particular issues were determined in that trial and an order entered determining these particular issues as of that date. What more do I need?" (TR. 120.)

"Mrs. Ryan: . . . Now he says that's all res judicata. If that's res judicata then the whole lawsuit is res judicata. . .

"Mr. Campbell: Collateral estoppel. This exact issue, namely, the amount of those things were determined in that suit. Those were found to be fact and approved.

"The Court: All right. The court will accept the determination made by the Kauai Court.

"Mrs. Ryan: Subject to the objection which I have stated." (TR. 123.)

Over petitioners' objections (preserved on appeal to the Hawaii Supreme Court), the jury was instructed as a matter of law "that the final order confirming sale (Exhibit 13) entered by the Fifth Circuit Court shall be accepted by you."

The Honolulu jury's verdict was in the exact amount of the deficiency noted in the Kauai order confirming sale.

The Honolulu trial court granted petitioners' post trial motions and set aside the money verdicts based solely on the Kauai judgment. Thus, it corrected its error, so that when the case went on appeal to the Hawaii Supreme Court, the lower court was, in effect, holding that neither the petitioners nor the mortgagee were estopped by the Kauai judgment.

The Hawaii Supreme Court reversed the trial court. Its Opinion (Petition, App. A), violates the elementary law that estoppels by judgment may not be repudiated and then invoked to suit the purposes of one of the parties. The opinion holds that the Kauai judgment did not estop the mortgagee from relitigating the liability of the petitioners for the deficiency on the judgment

even though the petitioners had been party defendants in the Kauai mortgage foreclosure action and even though the mortgagee waived the deficiency on the judgment in the Kauai suit. But the opinion holds that the Kauai judgment did estop petitioners from relitigating the amount of the mortgagee's damages, holding that, as against petitioners, the Kauai judgment was res judicata.

Mutuality of estoppel, in the sense involved here, is bottomed on the constitutional right to the equal protection of the law. Violation of the rule in this case deprived petitioners of their right to trial by jury as to damages, the jury being instructed that it must accept the Kauai judgment, the only "proof" of damages in the case. Petitioners were also deprived of due process of law in that they were not allowed to contest the issue of whether the mortgagee had an actionable case in fraud, since fraud without

damages is not actionable.

The question here presented was included within the proposition advanced by the petitioners to the Hawaii Supreme Court:

> "Appellant's Suggestion that Defendants in Fraud Cases May Not Contest on the Question of Damages is a Further Attempt to Deny Them Their Right to Trial by Jury and Their Right to Due Process of Law." (Answering Brief, S. Ct. No. 5021, pp. 14-17.)

If it is assumed that the mortgagee was not estopped by the first judgment from bringing the petitioners into court a second time, it follows, as a matter of "general elementary law," that the petitioners, in the second case, could not be estopped by the first judgment from showing the true (lack of) damages.

It is respectfully submitted that the judgment as to which certiorari is requested was secured by violating petitioners' rights to trial by jury, equal protection of the law and due process of law, and that the denial of certiorari should be

reconsidered.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, petitioners pray that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

DATED: Honolulu, Hawaii, this 5th day of June, 1972.

Respectfully submitted:

Helen B. Ryan

HELEN B. RYAN
Attorney for Petitioners
Suite 207
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Honolulu, Hawaii 96813

CERTIFICATE OF COUNSEL

As counsel for petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2), Rules of the Supreme Court of the United States.

DATED: Honolulu, Hawaii, this 5th day of June, 1972.

Helen B. Ryan

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SUPREME COURT, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1196

RALPH E. COREY and
ROBERT M. KIMBROUGH, Petitioners

v.

STATE SAVINGS & LOAN ASSOCIATION,
WALLACE C.S. YOUNG, and BETTER
BUILT HAWAII, LTD., Respondents.

REPLY TO BRIEF IN OPPOSITION TO GRANTING OF PETITION FOR CERTIORARI

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1971

RALPH E. COREY and ROBERT M. KIMBROUGH, Petitioners, vs. STATE SAVINGS & LOAN ASSOCIATION, WALLACE C.S. YOUNG, and BETTER BUILT HAWAII, LTD., Respondents.	)	No. 71-1196

REPLY TO BRIEF IN OPPOSITION TO GRANTING OF PETITION FOR CERTIORARI

Summary of Argument

Judged solely from the standpoint of the mortgagee's Brief in Opposition, this Court should grant certiorari.

The argument advanced by the mortgagee concedes the basic substance of each reason

given by petitioners in their application for the writ.

The mortgagee's Statement of the Case not only fails to point out any inaccuracies in Petitioners' Statement, but contains serious inaccuracies and misstatements in its own presentation.

To refuse the writ on the basis of the mortgagee's Brief in Opposition, this Court must find: (1) there can never be a federal question arising from a decision of a state court of last resort as long as there is an apparent adherence to formal procedural requirements; or (2) whatever the circumstances, this Court lacks jurisdiction to hear federal questions raised in the state court of last resort on a petition for rehearing.

I.

QUESTIONS PRESENTED
BY THE MORTGAGEE

Chicago B&Q R. Co. v. Chicago, 166 U.S.

266, decided by this Court in 1896, answers the Questions Presented" by the mortgagee.

". . . a state may not, by any of its agencies disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistant with that amendment. In determining what is due process of law regard must be had to substance not to form.

"It is clear that the last clause of the Seventh Amendment is not restricted in its application to suits at common law tried before juries in the courts of the United States. It applies equally to a case tried before a state court and brought here by writ of error from the highest court of the State. . . . The Seventh Amendment . . . could not have been intended thus to restrict the power of the courts of the United States to re-examine facts tried by juries in the Courts of the Union, and leave it open for those courts to re-examine in disregard of the rules of Common Law, facts tried by juries empanelled in the state courts in cases which, by reason of the questions involved in them could be brought under the cognizance of the courts of the United States . . .

"In harmony with those views, we may say in the present case that the state court

having jurisdiction of the subject matter and of the parties and being under a duty to guard and protect the constitutional rights here asserted, the final judgment ought not to be held to be in violation of the due process of law enjoined by the Fourteenth Amendment, unless by its rulings upon questions of law the company was prevented from obtaining substantially any compensation . . ." (Emphasis supplied.)

As in the instant case, the Opinion of the appellate court did not refer to the Constitution of the United States, but this Court in Chicago B&Q R. Co. v. Chicago, supra, at page 232, stated:

"There is, we conceive, no room to doubt that the legal effect of the judgment below was to declare that the rights asserted by the defendant under the National Constitution were not infringed by the proceedings in the case. Consequently, the motion to dismiss for want of jurisdiction must be overruled, and we proceed to examine the case upon its merits." (Emphasis supplied.)

The above case was cited in Shelley v. Kraemer, 334 U.S.1(1947), where this Court stated:

"That the action of state courts and

judicial officers in their judicial capacities is to be regarded as an action of the State within the meaning of the Fourteenth Amendment, is a proposition that has long been established by the decisions of this court. . . . Although, in construing the terms of the Fourteenth Amendment differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of state government."

II.

THE MORTGAGEE'S STATEMENT OF THE CASE

The Brief in Opposition contains a Statement of the Case which, with minor ellipses and one or two major alterations, is a verbatim transcript of the Opening Brief submitted by the mortgagee in Hawaii Supreme Court No. 5021 (53 Haw. 132).

Briefs in the lower courts are not ordinarily a part of the record. Live Oak Ass'n. v. R.R. Com., 269 U.S. 354, 357-8. When a lower court brief is submitted, as done here, without

record or transcript references, it cannot properly fulfill the function of showing wherein the petitioners' Statement of the Case contains inaccuracies or omissions. To the contrary the inaccuracies are contained in the mortgagee's Brief in Opposition (hereinafter abbreviated Opp. B.), and call for this reply:

Item 1. Repeated reference is made to a "$761,500.00" contract (Opp. B., p. 9, 14, 15, 18, and 22). The contract which contained that figure (Exhibit 4, Civil No. 19985) carried on its face the following condition:

> "The owner shall have the option to pay the contractor an alternate contract amount of: Cost plus 7%, cost being determined by Standard AIA accounting procedure."

Item 2. The Brief in Opposition (p. 9) infers that Mr. Brown calculated the amount of the mortgage by a precise mathematical formula. Mr. Brown, at the trial, was unable to recall the mechanics he used in arriving at the

$857,000 figure (TR. Civil No. 19985, 155-156).

Item 3. The heading, "A. Facts Surrounding the Conspiracy Agreement" (Opp. B., p. 13), is the same used by the mortgagee in its appellate court Opening Brief. Petitioners Corey and Kimbrough, in their appellate court Answering Brief, point out:

> "No conspiracy was pleaded or proved, except in the final amended complaint which was allowed over objection after the jury instructions were settled (TR. 754). The case was not submitted to the jury on a theory of 'conspiracy.'"

There follows, in petitioners' Answering Brief to the appellate court a section of argument entitled: "I. The Appellant's Opening Brief Impermissibly Attempts to Support the Verdict of Fraud by Marshalling the Evidence in Support of a Conspiracy to Defraud." The section concludes:

> "It is respectfully submitted that the 'second' amended complaint, and the section of the State Savings & Loan Opening Brief entitled 'Facts Surrounding the Conspiracy Agreement,' are a calculated effort to

deprive Defendants Corey and Kimbrough of their right to trial by jury and of their right to due process of law."

Most significantly, in its Reply Brief, the mortgagee concedes the following to the appellate court:

> "To be honest with this Court, State Savings at this time is unable to understand how this question is properly a part of the appeal before this court . . . A conspiracy was neither alleged nor tried because the facts are so clear that it is not necessary to do so." (Emphasis supplied.)

Item 4. The mortgagee infers (Opp. B., p. 17) that the contractor's cost estimate was created by the petitioners. To the contrary, Mr. Offer testified that the estimates were his, and that they proved to be accurate (TR. 19985, 322).

Item 5. After repeated references to an M. A. I. appraisal, to be made by an appraiser approved by the mortgagee (Opp. B., pp. 5, 9, 16), the mortgagee categorizes the appraisal as

"the developers' appraisal" (p. 18). This is an obvious attempt to distort the facts, since an independent appraisal was done by Mr. John Hulten, M.A.I., which shows that the value of the land and the proposed improvements fully supports the construction mortgage.

Item 6. The mortgagee's discussion of Civil No. 636 under the heading, "D. Foreclosure of the Mortgage" (Opp. B., pp. 19 et seq.), contains serious misstatements of the record:

(a) While the complaint in Civil No. 636 was amended on October 12, 1965, this was not "after Better Built Hawaii Ltd. . . . had joined the action" (Opp. B., pp. 19-20). The record certified to this Court shows that the mortgagee's original complaint for foreclosure, filed in Civil No. 636 in the Kauai court on July 16, 1965 names Better Built Hawaii, Ltd., as one of the original defendants (R. No. 5021, pp. 458-471).

(b) The mortgagee prevailed in convincing the Kaúai court that it had in personam as well as in rem jurisdiction (R. No. 5021, pp. 601-602). Yet, the mortgagee attempts to convince this Court, as it attempted to convince the appellate court, that Civil No. 636 on Kauai was solely an in rem proceeding. (Opp. B., p. 20).

(c) For no conceivable reason, other than to prejudice the record, the mortgagee refers to the fact that the "persons then in possession of the hotel physically abandoned the hotel after allowing the insurance to lapse . . . the hotel was left without a living soul to maintain and protect it." (Opp. B., p. 20.)

The mortgagee fails to illuminate the situation by showing that it was not Petitioners Corey and Kimbrough or even their mortgagor principal, who abandoned the hotel. It was other reputed owners, with whom the mortgagee had

sided in Chapter X proceedings, who took over and abandoned the hotel.

(d) This Court now has before it pertinent portions of the record from the Honolulu court, Civil No. 19985. A page-by-page comparison between the original complaint (R. 19985, pp. 1-8a) and the amended complaint (R. 19985, pp. 161-169) shows that page 1 (with the exception of the certificate of mailing), is identical with page 161; page 2 is identical with 162; page 3, including the amount claimed as damages, is identical with 163; page 4, including the amount claimed as damages, is identical with 164; page 5 is identical with page 165 down to the paragraph V.

On page 165, a new paragraph V contains an allegation as to the date of discovery of the alleged fraud, necessitated by the filing of Corey and Kimbrough's motion to dismiss (R. 19985, pp. 24-81; 123-125). Paragraphs V and VI on

page 5 are identical to paragraphs VI and VII on page 166, including the amount claimed as damages. The prayer for relief on pages 5 and 6 is identical, including amounts, to the prayer on pages 166-167.

In the face of this record, the mortgagee asserts (Opp. B., p. 22):

> "After the judicial deed had been delivered to State Savings by the commissioner and recorded in the Bureau of Conveyances, State Savings amended its complaint in this action to set forth its exact loss." (Emphasis supplied.)

The record further shows that the Order Confirming Sale in Civil No. 636 was filed on September 28, 1966 (R. 5021, pp. 479-482). This order was the sole and only evidence adduced by plaintiff to show its "loss." The summons and complaint were filed in Civil No. 19985 on September 19, 1966 (R. 19985, p. 1).

It is respectfully submitted that the foregoing misstatements of the record demonstrate the

necessity of this Court granting certiorari. Deliberate misstatements to this Court by the mortgagee would have been unnecessary if the true record could have supported the appellate court's judgment.

III.

THE MORTGAGEE'S ARGUMENT

A.

As pointed out in the Petition, the appellate court: (1) modified the contracts between the mortgagor and the contractor and between the petitioners and the mortgagee by conjectural conclusion (Petition, pp. 47; 20-23; 28); and (2) disregarded the well settled rule in Hawaii that the construction of a contract is a question of law to be decided by the court, and not the jury (Petition, pp. 23-24; 33-35).

The mortgagee's Brief in Opposition (p. 23) concedes that the jury was instructed, over peti-

tioners' objection, to construe the contract between Kimbrough, Corey, and the mortgagee. Without answering petitioners' contention that the settled law of the State is that the construction of a contract is a question of law for the trial judge, the mortgagee, in its Brief in Opposition, merely quotes from the Opinion of the appellate court. The petitioners have already pointed out that the cases cited by the appellate court in that paragraph do not, in any way, relate to the construction of a contract by a jury (Petition for Rehearing, Appendix C of Petition for Writ, pp. 77-78).

The mortgagee's Argument does not answer, and therefore implicitly concedes petitioners' claim that the appellate court did in fact modify the contracts in question by conjectural conclusion.

It is therefore respectfully submitted that, in reference to the contracts, petitioners have

unequivocally established the basis for claiming abridgment of rights and immunities protected by the Fourteenth Amendment to the Constitution of the United States.

B.

The Brief in Opposition contains no discussion of the rights of the petitioners to the equal protection of the laws. The mortgagee takes the position that the Fourteenth Amendment guarantees to a civil litigant only the right to apparent adherence to formal procedural requirements. This sophomoric view of constitutional law is conclusively contradicted by this Court in Gulf, Colorado & Sante Fe Railway Co. v. Ellis, 165 U.S. 150, 159, and Yick Wo v. Hopkins, 118 U.S. 356, 370, cited in the Petition at pages 31 and 41.

By failing to show that the established law is other than that presented in the Petition, the mortgagee admits that the petitioners were

denied their privileges and immunities, due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment in each instance where the appellate court disregarded statutes, rules and decisional law favoring the petitioners.

C.

In Appendix A to the Petition, there is set forth § 1-1 of Hawaii Revised Statutes (Petition, p. 43). The annotations given show that the Statute was first adopted by the laws of 1892 and amended into its present form in 1903. Hawaii v. Mankichi, 190 U.S. 197 (1903) contains a historical review of the status of the common law in Hawaii.

The Petition for the Writ carefully sets forth how Hawaii's rule of res judicata was adopted from the U.S. Supreme Court and applied by the Territory and then by the State of Hawaii (Peti-

tion, pp. 35-39). The failure to apply the rule was cited as an example of how the appellate court's capricious and discriminatory action injected the federal question into the case.

Asserting that the State court did not pass on or decide any federal question (Opp. B., p. 25), is not a response to the contention that it was the Opinion itself which injected the federal questions raised in the petition. (Cf. Lear Inc. v. Adkins, 395 U.S. 653 [1969].)

The mortgagee's citation of McCorquodale v. Texas, 211 U.S. 432 (1908), Loeber v. Schroeder, 149 U.S. 58 (1893) and Pim v. St. Louis, 165 U.S. 273 (1897), in the Brief in Opposition (p. 26), as controlling authority on whether federal questions may be raised on a petition for rehearing is either disingenuous or ingenuous.

In any event, Tidal Oil Co. v. Flanagan, 263 U.S. 444, shows how the Act of 1922 rendered

obsolete 165 U.S. 273, among other cases.

Further, the Petition clearly states (p. 4) that jurisdiction is invoked under Title 28, Sec. 1257(3), which supersedes Act 122, as amended, and subsequent statutes. Irrespective of statutory change, as early as 1917, in Saunders v. Shaw, 244 U.S. 317, 320, this Court stated:

> "But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. . . . The denial of rights given by the Fourteenth Amendment need not be by legislation. Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278."

In this connection, the appellate court, itself, was cognizant of the constitutional impact of its decision in the case at bar. Curiously enough, the justice who wrote the Opinion is also the author of the dissent in Hawaii Nat'l. Bank v. Okino, 51 Haw. 367, 370-374 (1969) (noted at

page 33 of the Petition). In that dissent, Justice Kobayashi states (pp. 373-374):

> "The case of Saunders v. Shaw, 244 U.S. 317 (1917), is directly in point. I am at a loss in comprehending the majority's failure to discuss it and disturbed and concerned with the majority's refusal to grant to appellant the substantive right guaranteed by the U.S. Constitution and the State of Hawaii Constitution . . . The majority abuses the power of the appellate court and the result to American Security Bank is a denial of fundamental rights guaranteed by the State of Hawaii and the United States Constitution."

This Court's attention is also respectfully called to the following:

> "It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the State. Ordinarily it will not consider contentions first made in a petition to the state court for rehearing where the petition is denied without more. Citizens National Bank v. Durr, 25 U.S. 99, 106. But here the company, at the first opportunity invoked the protection of the federal Constitution and the laws of the United States. . . . It may not reasonably be held that the company was bound to anticipate such a construction or in advance to invoke federal protection against the taxation of its United States bonds. Upon the facts disclosed by this record it is clear that appellant sufficiently raised in the

highest court of the State the federal questions here presented and is entitled to have them considered." Missouri v. Gehner, 281 U.S. 313, 320 (1930), citing Saunders v. Shaw, supra.

D.

That the portion of the Opinion of the Hawaii Supreme Court entitled, "VIII: Attorney Corey's Conduct," donied Petitioner Corey due process of law is conceded by the mortgagee (Opp. B., Argument IV, page 26).

If section VIII is dictum (Opp. B., pp. 3 and 26), by definition it is a judicial opinion on a point other than issues involved in the case. As to this issue, Petitioner Corey was never given an opportunity to be heard (Appendix C to Petition for Writ, pp. 93-98, and Appendix A, Petition for Writ: H.R.S., § 602-13, 605-9, p. 44, and Rule 16, pp. 46-50).

> "The action of State Courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of

course, long been regarded as a denial of due process of law guaranteed by the Fourteenth Amendment." Shelley v. Kraemer, 334 U.S. 1, citing Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673; and Pennoyer v. Neff, 95 U.S. 714.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

DATED: Honolulu, Hawaii, this 20th day of April, 1972.

Respectfully submitted:

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